No. 01-1572-CFX Title: Cook County, Illinois, Petitioner
v.
United States, ex rel. Janet Chandler

Docketed: April 24, 2002 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Apr 19 2002	Petition for writ of certiorari filed. (Response due May 31, 2002)
	May 7 2002	Waiver of right of respondent Hektoen Institute of Medical Research to respond filed.
	May 17 2002	Order extending time to file response to petition until May 31, 2002.
	May 31 2002	Brief amicus curiae of National Association of Public Hospitals, et al. filed.
	May 31 2002	Brief amici curiae of City of New York, et al. filed.
	May 31 2002	Brief of respondent Janet Chandler in opposition filed.
	Jun 6 2002	Reply brief of petitioner Cook County, Illinois filed.
	Jun 11 2002	DISTRIBUTED for Conference of June 27, 2002
	Jun 28 2002	Petition GRANTED. SET FOR ARGUMENT January 14, 2003. **********
	Jul 22 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including September 9, 2002.
	Jul 24 2002	Motion of the parties to dispense with printing the joint appendix filed.
	Sep 6 2002	Motion of the parties to dispense with printing the joint appendix GRANTED.
	Sep 9 2002	Brief of petitioner Cook County, ILlinois filed.
	Sep 9 2002	Brief amici curiae of County of Orange, California, et al. filed.
	Sep 9 2002	Brief amici curiae of National Association of Public Hospitals, et al. filed.
	Sep 9 2002	Brief amici curiae of Local Governmental Airport Proprietors, Albuquerque, et al. filed.
	Sep 9 2002	Brief amici curiae of National Association of Counties, et al. filed.
	Sep 9 2002	Brief amici curiae of Texas Assn.of School Boards Legal Assistance Fund, et al. filed.
	Sep 9 2002	Brief amici curiae of City of New York, et al. filed.
	Sep 9 2002	Brief amicus curiae of County of Delaware, Pennsylvania filed.
	Sep 24 2002	Order extending time to file respondent's brief on the merits to and including November 4, 2002.
	Nov 4 2002	Brief amicus curiae of United States filed.
	Nov 4 2002	Brief of respondent U.S. ex rel Janet Chandler filed.
	Nov 4 2002	Brief amici curiae of K & R Limited Partnership, et al. filed.
	Nov 4 2002	Brief amici curiae of Taxpayers Against Fraud, et al. filed.
	Nov 19 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

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Entry	Date	Proceedings and Orders
	Nov 21 2002	CIRCULATED.
	Dec 4 2002	Reply brief of petitioner Cook County, IL filed.
	Dec 16 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 14 2003	ARGUED.

Supreme Court, U.S.
FILED
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(1)

No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether local governmental entities are subject to *qui tam* actions under the False Claims Act. 31 U.S.C. § 3729.

LIST OF PARTIES

The parties to the proceeding below were the petitioner/defendant, Cook County, Illinois, the petitioner's co-defendant, the Hektoen Institute For Medical Research, and the respondent/plaintiff, Janet Chandler, a relator under the False Claims Act. The United States declined to intervene in this case but participated in the issues raised in this petition as an *amicus curiae* before the United States Court of Appeals for the Seventh Circuit.

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IN THE

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No. ___

COOK COUNTY, ILLINOIS,
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UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cook County, Illinois ("Cook County"), respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit entered on January 22, 2002.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District of Illinois, which dismissed Cook County from this False Claims Act action. The Seventh Circuit's opinion (App. 1a-26a) is reported at 277 F.3d 969 (7th Cir. 2002). The district court's opinion granting Cook County's motion to reconsider its earlier opinion and dismissing Cook County (App. 27a-29a) is reported at 118 F. Supp. 2d 902 (N.D. Ill. 2000).

The district court's earlier opinion denying Cook County's motion to dismiss (App. 30a-49a) is reported at 35 F. Supp. 2d 1078 (N.D. Ill. 1999). The Seventh Circuit's Order dismissing the appeal of the district court's earlier opinion (App. 50a) is unreported. The Court's denial of *certiorari* of that Seventh Circuit dismissal order (App. 51a) is reported at 528 U.S. 931, 120 S. Ct. 329 (1999).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which Cook County seeks review was entered on January 22, 2002. This Court's jurisdiction to review the Seventh Circuit's opinion is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

§ 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes

to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative

action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3729 (1994).

STATEMENT

A. Background

This lawsuit arises out of a $5 million federal grant to fund a medical treatment program and research study at Cook County Hospital ("CCH"). The allegations[1] are as follows: In 1989, the United States Department of Health and Human Services ("DHHS") and the National Institute of Drug Abuse ("NIDA") called for proposals to provide treatment to and conduct a study of substance-abusing pregnant women. (Am. Compl. at ¶ 15.) CCH, a Cook County-owned and operated non-profit hospital that provides health care and related services to residents of Cook County, submitted a grant proposal. (*Id.* at ¶¶ 12, 13, 16.) NIDA awarded CCH the grant on September 30, 1989 and released initial payments shortly thereafter. (*Id.* at ¶ 27.) In the first two years of the grant, the protocol was developed, and, around July 1991, CCH began recruiting participants. (*Id.* at ¶ 28.) On September 1, 1993, NIDA transferred the administration of the grant from CCH to the Hektoen Institute of Medical Research ("Hektoen"), a non-profit organization that conducts medical research and manages research grants. (*Id.* at ¶¶ 11, 29.) Hektoen employed Janet Chandler ("Relator"), a clinical

[1] After the district court denied its original motion to dismiss, Cook County filed an answer to the Amended Complaint, denying the substantive allegations. This case went to the Seventh Circuit on a grant of Cook County's motion for reconsideration dismissing Cook County from this lawsuit. All the factual allegations contained in a complaint are taken as true on review of the grant of a motion to dismiss. *Swierkiewicz v. Sorema N.A.*, ___ U.S. ___, 122 S. Ct. 992, 995 n.1 (2002).

psychologist, as project director on October 1, 1993, (*id.* at ¶ 29), and fired her on January 24, 1995. (*Id.* at ¶ 97.)

Relator brought this False Claims Act ("FCA") action, 31 U.S.C. § 3729, alleging that "[t]he false claims arise out of the defendants' knowing and deliberate failure to comply with the express terms and conditions incorporated in and promised by the grant, the reporting of 'ghost' research subjects, and other material misrepresentations about the progress and success of the study" and that "defendants disregarded the required protocol." (*Id.* at ¶ 4.) Relator additionally alleges that she was retaliated against for disclosing these deficiencies "to the defendants and to appropriate governmental oversight agencies." (*Id.* at ¶ 5.) Relator claims that the United States was damaged in the total amount of the grant, $5 million. (*Id.* at ¶ 111.) Relator seeks treble the amount of the grant, that is to say, $15 million, plus fines of up to $10,000 each for an unspecified number of alleged false claims, plus costs and attorneys' fees. The defendants are Cook County, as the owner and operator of CCH, and Hektoen, as the administrator of the grant. The United States declined to intervene.

B. The Statutory Framework of the False Claims Act

The FCA subjects "[a]ny person" to liability who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). Congress has not defined the term "person" in the FCA, but the Court has noted that "the term 'person' has remained in the statute unchanged since 1863," when the statute was first enacted. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12, 120 S. Ct. 1858, 1868, n.12 (2000). In 1986, Congress enacted significant amendments to the FCA. Recently, a number of lawsuits have been filed against States and other governmental entities, one of which reached the Court. On

May 22, 2000, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Court held that States and their agencies are not "persons" subject to liability under the FCA. *Id.* at 787, 120 S. Ct. at 1870. The Court reached its conclusion as a matter of statutory construction. *Id.*

In analyzing whether States are "persons" under the FCA, *Stevens* began with the longstanding interpretative presumption that the word "person" does not include a sovereign without an affirmative showing of a contrary intent from Congress. *Id.* at 780-81, 120 S. Ct. at 1866-67. The Court then considered the historical context of the original enactment, noting that the FCA was enacted to stop the fraud perpetrated by private contractors during the Civil War. *Id.* at 781, 120 S. Ct. at 1867. The Court concluded that the text of the 1863 enactment did "less than nothing to overcome the presumption that States are *not* covered." *Id.* at 782, 120 S. Ct. at 1868 (emphasis in original).

The Court found that certain features of the 1986 amendments "further support the conclusion that States are not subject to *qui tam* liability." *Id.* at 783, 120 S. Ct. at 1868. First, the provision which allows the Attorney General to issue civil investigative demands ("CID"), 31 U.S.C. § 3733, defines "person" as including States. The Court reasoned that "[t]he presence of such a definitional provision in § 3733, together with the absence of such a provision from the definitional provisions contained in § 3729 . . . suggests that States are not 'persons' for purposes of *qui tam* liability under § 3729." *Id.* at 784, 120 S. Ct. at 1868-69. Next, the Court found that the mandatory treble damage scheme of the current version of the FCA is "essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.* at 784-85, 120 S. Ct. at 1869 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63, 101 S. Ct. 2748 (1981)). Third, the Court noted that

the Program Fraud Civil Remedies Act of 1986 ("PFCRA"), 31 U.S.C. § 3801, the FCA's sister scheme that creates administrative remedies for false claims, contains a definition for "persons" subject to liability that does not include States. *Id.* at 786, 120 S. Ct. at 1870. "It would be most peculiar to subject States to treble damages and civil penalties in *qui tam* actions under the FCA, but exempt them from the relatively smaller damages provided under the PFCRA." *Id.* The Court concluded that the FCA does not subject States and their agencies to *qui tam* liability. *Id.* at 788, 120 S. Ct. at 1871.

C. The Proceedings Below

1. Relator filed her complaint under seal on January 24, 1997. After the United States declined to intervene, Relator amended her complaint and served it on the defendants. All the defendants moved to dismiss. During the briefing of the motions to dismiss, an opinion issued from the United States District Court for the Southern District of New York that held that the FCA "does not authorize suits against municipal entities." *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998). In light of that decision, Cook County sought, and was granted, leave to supplement its motion to dismiss.

On February 8, 1999, the district court denied Cook County's motion to dismiss, holding that municipal entities are "persons" under the FCA and that, because the mandatory treble damage scheme is not punitive, Cook County is not immune from an FCA suit. *United States ex rel. Janet Chandler, Ph.D. v. The Hektoen Institute For Medical Research, et al.*, 35 F. Supp. 2d 1078 (N.D. Ill. 1999).[2] (App. 30a) Cook County appealed the district court's denial

[2] CCH, originally named as a defendant, was dismissed as a nonsuable entity, and Cook County's motion to dismiss as to the whistleblower claims under the FCA and state common law was granted. *Chandler*, 35 F. Supp. 2d at 1078, 1087. (App. 49a)

of its immunity claim under the collateral order doctrine. In an unpublished order, on May 18, 1999, the Seventh Circuit dismissed the appeal. *Janet Chandler, Doctor v. Cook County, Illinois*, No. 99-1415 (7th Cir. May 18, 1999). (App. 50a) Cook County petitioned the Court for a writ of certiorari, which the Court denied on October 12, 1999. *Cook County, Illinois v. Janet Chandler, Ph.D.*, 528 U.S. 931, 120 S. Ct. 329 (1999). (App. 51a)

2. After the Court decided *Stevens*, Cook County moved the district court to reconsider its denial of Cook County's motion to dismiss. In its opinion, the district court maintained its original position that Cook County is a person under the FCA. *United States ex rel. Chandler v. Hektoen Institute for Med. Research*, 118 F. Supp. 2d 902, 903 (N.D. Ill. 2000). (App. 28a) However, because, under *Stevens*, the FCA's mandatory damages are punitive, the district court, adopting the reasoning of *United States ex rel. Dunleavy v. County of Delaware*, 2000 WL 1522854, 2000 U.S. Dist. LEXIS 14980 (E.D.Pa. Oct. 12, 2000), held that Cook County is immune from an FCA suit and dismissed Cook County from this lawsuit. *Id.* Relator appealed to the Seventh Circuit. In the appellate court, the United States filed an *amicus curiae* brief on behalf of the Relator, as did the Taxpayers Against Fraud.[3] The Seventh Circuit reversed the dismissal of Cook County.

The Seventh Circuit began its analysis with the proposition that "municipal corporations were presumptively included within the meaning of 'person'" in 1863 and, finding no

[3] The Seventh Circuit consolidated Relator's appeal of the dismissal of Cook County, (Appeal No. 00-4110), with Cook County's appeal of the district court's order requiring Cook County to disclose to Relator's attorneys original unredacted treatment and research records of the grant participants. (Appeal No. 01-1810.) *Chandler*, 277 F.3d at 973. (App. 6a.) The United States filed an *amicus curiae* brief on behalf of Cook County with respect to Appeal No. 01-1810. The issues raised in Appeal No. 01-1810 are not involved in this petition.

"exception for suits against municipalities," determined that Congress intended to subject local governments to liability under the original version of the FCA. *Chandler*, 277 F.3d at 974. (App. 8a.) Next, the Seventh Circuit concluded that the 1986 amendments point "to a finding of continued municipal liability." *Id.* at 975-76. In so doing, the Seventh Circuit relied on a 1986 Senate Committee Report for the proposition that the purpose of the amendments was "to increase the effectiveness of the Act" by giving federal law officers more effective tools and by increasing the percentage of proceeds a relator may receive. *Id.* (citing S. Rep. No. 99-345 at 2, *reprinted in* 1986 U.S.C.C.A.N. 5266). (App. 10a-11a.)

Having found that local governments are "persons" under the FCA, the Seventh Circuit considered the 1986 increase in the FCA's penalty from double to treble damages to decide whether the common-law immunity from punitive damages on governmental entities applies. *Id.* at 976-77. (App. 13a.) As the Seventh Circuit read *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981), the immunity does not apply to the FCA. *Id.* at 977-978. (App. 13a-16a.) In the Seventh Circuit's view, the taxpayers have already been enriched by the municipality's fraudulent conduct in that "any ill-gotten gains from the federal government produce more services or lower taxes." *Id.* at 978. (App. 15a.) The Seventh Circuit reasoned that the FCA's treble damages scheme is "a response specifically determined by Congress as necessary for the effective operation of the FCA." *Id.* (App. 16a.) Because Congress did not specifically indicate that it intended to exempt local governments from the scope of the FCA, the Seventh Circuit refused to find that Congress did so *sub silentio*. *Id.* at 979. (App. 17a.) The Seventh Circuit rejected the presumption of governmental immunity from punitive damages because "Congress, in creating, in 1863, and then strengthening, in 1986, a comprehensive mechanism designed

to remedy fraud against the federal government clearly determined that recipients of federal funds must be subject to such a deterrent." *Id.* (App. 18a.)

The Seventh Circuit reversed the district court's dismissal of Cook County and remanded the case to the district court. *Id.* at 983. (App. 26a.) Recognizing that the unanimous decision constituted a split from the Fifth Circuit's holding in *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 495 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002), the panel circulated the opinion to the entire court, but no active judge voted to hear this case *en banc*. *Chandler*, 277 F.3d at 980 n.10. (App. 19a.) One week after the Seventh Circuit decided *Chandler*, the Third Circuit affirmed the district court and held that local governments may not be sued under the FCA. *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 226 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002). Cook County moved for a stay of mandate pending its petition for certiorari, which the Seventh Circuit granted. *United States ex rel. Chandler v. Cook County, Illinois*, Nos. 00-4110 & 01-1810, 2002 U.S. App. LEXIS 2587 (7th Cir. Feb. 15, 2002).

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve a question of first impression under federal law, a question that is critical to tens of thousands of local governments receiving federal funds, namely, whether local governments are subject to suit under the FCA. The question is recurring throughout the federal courts. Yet, the circuits are sharply divided, not only as to their ultimate holdings, but also as to their reasoning. District courts in circuits that have not yet decided the issue are also coming to different conclusions. Much of the conflict is over the meaning of *Stevens* and the application of *City of Newport* to FCA claims against local governments. The Court should take hold of this

opportunity to resolve the split in the circuits, correct the serious errors made by the Seventh Circuit in this case, and clarify an issue critically impacting local governments across the United States.

I. THERE IS A SQUARE AND IRRECONCILABLE CONFLICT IN THE CIRCUITS REGARDING LOCAL GOVERNMENTAL LIABILITY UNDER THE FALSE CLAIMS ACT.

In ruling that local governments are "persons" under the FCA, the Seventh Circuit knowingly parted company with the Fifth Circuit, the first of the circuits to analyze whether local governments are subject to liability under the FCA. One week after the Seventh Circuit's opinion, the Third Circuit, siding with the Fifth Circuit, held that local governments are not subject to suit under the FCA.

1. The issue addressed by the Fifth Circuit was whether a school board qualifies as "any person" under the FCA. *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 489 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002). A jury found that the school board had submitted 1,570 false claims to the federal government over the course of eleven years and that the federal government's actual damages were $7.6 million, which the court trebled to $22.8 million and added a civil penalty of $7.85 million. *Id.* at 488.

The Fifth Circuit found guidance in that portion of *Stevens* holding that the FCA's mandatory treble damage scheme is punitive and "contrary to the well-settled presumption that governments, including local governments, are not subject to punitive damages." *Id.* at 491. Noting that the Court has held that "imposing punitive damages on local governments is ordinarily contrary to sound public policy," the Fifth Circuit went on to say that: "Though a local government can properly be made to pay compensation for the wrongful acts of its

agents, punishing a local government is pointless." *Id.* The Fifth Circuit was particularly troubled by a policy that would impose punitive damages on local governments in favor of the federal government: "Requiring such a transfer payment would reflect a judgment by Congress that denying the schoolchildren of Orleans Parish needed services, or requiring the taxpayers of Orleans Parish to pay higher taxes, is justified in light of the relatively minor benefit to the federal treasury." *Id.* at 492. The Fifth Circuit concluded: "Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the False Claims Act." *Id.*

Unlike the Seventh Circuit, the Fifth Circuit found the 1986 Senate Committee Report at S. Rep. No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266, faulty for two reasons: "it cites to a case concerned with an entirely different federal statute, namely 42 U.S.C. §1983" and it is "post-enactment legislative history, and 'utterly irrelevant' to determining the meaning of the term person in the liability portions of the False Claims Act." *Id.* at 489-90 n.3. The Fifth Circuit found that neither the relator nor the United States provided any authority to indicate that, in 1863, Congress contemplated liability for local governments under the FCA. *Id.* at 494. The Fifth Circuit concluded by finding that a statement made by the D.C. Circuit was applicable to local governments: "'Even if one assumes that states commit a good deal of fraud against the federal government, it cannot seriously be argued that the very purpose of the [False Claims] Act would be thwarted if states were not liable under the [False Claims] Act.'" *Id.* at 494-95 (quoting *United States ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 870, 875 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202, 120 S. Ct. 2194 (2000)). Under the Fifth Circuit's holding, "the term person in the liability provision of the [FCA] does not include local governments." *Garibaldi*, 244 F.3d at 495.

2. One week after the Seventh Circuit rendered its decision in *Chandler*, the Third Circuit weighed in. Like the Fifth Circuit and contrary to the Seventh Circuit, the Third Circuit held that local governments cannot be subject to an FCA suit by a *qui tam* relator. *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 226 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002).

The Third Circuit began its analysis with the well-established presumption that "[u]nless Congress clearly provides otherwise, a local governmental entity is immune from punitive damages awards." *Id.* at 222. The Third Circuit viewed the issue of "whether the term 'person' as used in the Act encompasses local governments . . . [as] simply the other side of the coin with respect to the question . . . whether Congress clearly abrogated local governmental immunity under the FCA." *Id.* at 223 ("If Congress clearly expressed its intention to encompass local governments within the ambit of FCA liability as a 'person,' then it must also have intended to abrogate the common law immunity of local governments against punitive damages under the FCA."). The Third Circuit determined that nothing on the face of the 1863 enactment or the current version of the FCA shows a clear indication from Congress that local governments are subject to punitive damages under the FCA. *Id.* at 224 ("The Act is utterly devoid of any specific intention to subject local governments to its strictures."). The Third Circuit found that "[t]his lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA." *Id.* In so finding, the Third Circuit implicitly rejected the very arguments that carried the day in the Seventh Circuit, namely, (i) local governments were presumptively "persons" in 1863 and, without an indication from Congress to the contrary, automatically subject to the FCA; and (ii) in 1986, when Congress imposed punitive damages, it intended to subject

local governments to punitive damages. Unlike the Seventh Circuit, the Third Circuit did not find that the 1986 imposition of punitive damages was a "clear intent to abrogate common law immunity and subject local governments to punitive damages awards." *Id.* at 224-25.

In addition, the Third Circuit, like the Fifth Circuit and unlike the Seventh Circuit, did not find the 1986 Senate Committee Report persuasive. *Id.* at 225 (citing *Stevens*, 529 U.S. at 783 n.12, 120 S. Ct. at 1868 n.12). The Third Circuit concluded that there is "only ambiguity as to whether Congress intended to disturb the well-settled doctrine of local governmental immunity from punitive damages under the FCA," which "is not enough . . . to carry the day." *Id.*

While the FCA's mandatory punitive damage scheme was central to their analyses, there are subtle differences between the Fifth and the Third Circuits' decisions, with the Fifth Circuit ultimately finding that local governments are not persons under the FCA, *see Garibaldi*, 244 F.3d at 495, and the Third Circuit finding that they are immune from suit. *Dunleavy*, 279 F.3d at 226.

3. Although the remaining circuits have yet to address whether local governments are subject to FCA suits, district courts within the Second, Eighth, Ninth, Eleventh, and D.C. Circuits have reached conflicting results.

- In the Second Circuit, the United States District Court for the Southern District of New York was the first federal court to address whether local governments could be sued under the FCA. *United States ex rel. Graber v. City of New York, et al.*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998). After conducting an exhaustive recitation of the FCA's background, the *Graber* court dismissed both the City and State of New York, holding that "Congress in 1863 did not contemplate that states and cities would be defendants in False Claims Act suits." *Id.* at 352.

Graber also concluded that States and municipalities were not subjected to the FCA by the 1986 amendments because Congress nowhere explicitly expressed an intent to impose punitive damages on them. *Id.* at 352-53. The Second Circuit's subsequent decision in *United States ex rel. Stevens v. Vermont Agency of Nat'l Resources*, 162 F.3d 195 (2d Cir. 1998), impliedly reversed the *Graber* decision. The Court, in turn, reversed the Second Circuit's opinion. *Stevens*, 529 U.S. 765, 120 S. Ct. 1858.

- In the Eighth Circuit, a district court concluded that local governments are not persons under the FCA. *United States ex rel. Kinney v. Hennepin County Med. Ctr.*, 2002 U.S. Dist. LEXIS 10170 (D. Minn. Jan. 22, 2001). There, a former paramedic of defendant Hennepin County Medical Center ("HCMC") alleged false claims to the federal Medicare and Medicaid programs. *Id.* at *2. The district court found in favor of HCMC under the common-law presumption against municipal liability for punitive damages: "When Congress amended the FCA to increase the liability from double damages to treble damages, thus making the FCA 'essentially punitive,' it did not clearly authorize the imposition of such damages against municipalities." *Id.* at *24. Based on the common-law immunity, HCMC was dismissed with prejudice.
- In the Ninth Circuit, the district courts are in conflict with each other.
  - In the Northern District of California, one district court held that local governments are subject to the FCA, and another district court held the opposite. In *United States ex rel. Rosales v. San Francisco Hsg. Auth.*, 173 F. Supp. 2d 987 (N.D. Cal. 2001), relators brought an FCA action against the San Francisco Housing Authority ("SFHA") and the City and County of San Francisco, alleging that false statements were

made to the Department of Housing and Urban Development ("HUD") for grant funds. *Id.* at 991. The district court, after analyzing *Stevens*, reasoned that local governments were considered persons at the time of the original enactment, *id.* at 1015, and that the mandatory treble damage scheme is remedial and not punitive. *Id.* at 1024. On the other hand, in *United States ex rel. Honeywell v. San Francisco Housing Auth., et al.*, 2002 U.S. Dist. LEXIS 9743 (N.D. Cal. July 12, 2001), the district court, declining to follow *Rosales*, instead relied on the Fifth Circuit's decision in *Garibaldi*, which was decided shortly after *Rosales*. *Id.* at *10. The complaint in *Honeywell* was also brought against the SFHA and the City of San Francisco for alleged false claims to HUD. *Id.* at *2. The *Honeywell* court, however, determined that, under *Stevens*, the FCA's damage scheme is punitive, noting the "'presumption against the imposition of punitive damages on governmental entities.'" *Id.* (citing *Stevens*, 529 U.S. at 785, 120 S. Ct. at 1869). The *Honeywell* court further noted that there is no indication that Congress ever intended to subject local governments to the FCA's liability. *Id.*

- In the Central District of California, the same conflict exists. In *United States ex rel. Giles v. Sardie*, 2000 U.S. Dist. LEXIS 21068 (C.D. Cal. July 27, 2000), an FCA case brought against, *inter alia*, the City of Los Angeles, the district court was not "persuaded by the argument that *Stevens* stands for the proposition that municipalities are immune from the liability provision of section 3729(a) of the FCA." *Id.* at *13. Consequently, the City of Los Angeles' motion to dismiss was denied. *Id.* at *16. *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Cal. 2001), was also brought against the City of Los Angeles. The *Satalich* court, finding both *Rosales* and

Giles unpersuasive, concluded "that *Stevens* bars FCA suits against municipalities." *Id.* at 1102. Relying on municipal immunity from punitive damages and rejecting the argument that "any person" must include municipal corporations, the district court dismissed the City of Los Angeles. *Id.* at 1104, 1106.

- In the Eleventh Circuit, a district court concluded that the legislative history shows that local governments were not intended "to be defined as persons" under the FCA. *United States ex rel. King v. Jackson County Hosp. Corp. of Mariana, Fl.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001). A surgeon at Jackson County Hospital ("JCH") brought an FCA suit alleging that false statements were made to the federal government under Medicare and Medicaid. After analyzing the legislative history of the FCA, the district court concluded that "Congress did not envision that local governments would be subject to FCA liability at the time of enactment." *Id.* at *17. The district court further concluded that "local governmental agencies should not be held liable because the FCA's imposition of punitive damages is contrary to the presumption that local governments are not subject to punitive damages." *Id.* The district court granted JCH's motion to dismiss on the ground that it "is not a 'person' under the liability provisions of the FCA." *Id.* at *23.

- In the D.C. Circuit, the district court held that governmental entities are subject to *qui tam* liability under the FCA. *United States ex rel. K & R Ltd. P'ship v. Massachusetts Hsg. Fin. Agency*, 154 F. Supp. 2d 19, 26 (D.D.C. 2001). There, the relator filed a *qui tam* action against the Massachusetts Housing Finance Agency ("MHFA"), an entity that was created by the Massachusetts Legislature. *Id.* at 20-21. The court determined

that the MHFA, as a "governmental entity," *id.* at 21, is not immune from the FCA's mandatory punitive damages in light of *Stevens*:

> If this Court were to now dismiss K&R's complaint on the grounds that the MHFA is immune from the damages awarded under the FCA, it would, in effect, accept a loophole in the Act that would allow entities with some connection to the state, but that are considered "persons" subject to suit under the FCA, to escape liability for any false claims made to the federal government. Although Congress has made the damages awarded under the current version of the FCA punitive in nature, this Court does not believe that in doing so Congress intended to create such a gap in the statute.

Id. at 24. MHFA's motion to dismiss was, thus, denied. *Id.* at 27.

As the above cases demonstrate, the question of whether the FCA subjects local governments to liability has resulted in irreconcilable conflict, primarily stemming from a fundamental disagreement over the meaning of *Stevens* and the application of *City of Newport* to FCA claims against local governments. There is no realistic probability that the conflict will go away without an interpretation from the Court. Therefore, further review is needed.

II. THE ISSUES RAISED ARE RECURRING AND CRITICAL FOR TENS OF THOUSANDS OF LOCAL GOVERNMENTS.

Whether Congress intended to include local governments as "persons" subject to liability under the FCA, especially in light of the punitive damage scheme under the 1986 amendments, is an important issue of federal law. As the above FCA opinions illustrate, given the vast number of local governments throughout the country, this issue will recur, and

the courts will continue to reach different conclusions under diverse interpretations of *Stevens* as well as *City of Newport*, resulting in a disparate application of the FCA.

There are tens of thousands of units of local governments in the United States, including municipalities, counties, and school districts. Local governments and the United States enjoy a cooperative relationship, with the federal government providing funding for services that local governments, in turn, provide directly to its residents. In fact, it is this cooperative relationship of passing funds to a local government for the administration of direct services that, in part, renders local governments "deep pocket" targets for FCA lawsuits. If applicable to them, the FCA's punitive damage scheme leaves local governments with equally unpalatable choices of rejecting federal funds or, if sued, either being coerced into high settlements by the threat of punitive damages or incurring the cost of litigation and risking a substantial adverse judgment, which, of course, is shouldered by the local taxpayers. The ramifications of *qui tam* suits for local governments can, indeed, be devastating. For that reason, during the briefing of the *Stevens* case, Cook County, together with the City of Los Angeles and the City and County of San Francisco, joined the City of New York's *amicus curiae* brief on behalf of the Vermont Agency of Natural Resources. Clearly, the issues raised in this case have comparable importance for local governments around the nation.

The Court granted review in *Stevens* to settle a conflict regarding the important issue of whether States and their agencies are subject to *qui tam* suits under the FCA. Now, the conflict in the circuits involves whether local governments are subject to *qui tam* liability under the FCA. There are many more units of local government than there are States and state agencies that are potential defendants in an FCA

suit. Given the number of local governments and the importance of the question of the applicability of the FCA to all local governments, review should not be delayed.

III. THE DECISION BELOW IS MANIFESTLY INCORRECT.

The Court's review is also warranted because the Seventh Circuit's decision that local governments are subject to FCA suits is manifestly incorrect.

1. Neither the text nor the legislative history of the FCA support the Seventh Circuit's conclusion that local governments are subject to FCA suits. Yet, without any consideration of the context of the word "person" in the original statute and in its legislative history, the Seventh Circuit's decision rests on an erroneous assumption that the term "person," when otherwise undefined in a statute and without a specific indication from Congress to the contrary, necessarily includes local governments. *Chandler*, 277 F.3d at 974. (App. 8a.) The Seventh Circuit skipped a vital step in its statutory construction analysis. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 574 (1991) ("the meaning of statutory language, plain or not, depends on context"). Had the Seventh Circuit examined the meaning of "person" within the context of the FCA's enactment, it could not have reconciled its conclusion with this Court's recurring interpretation of the FCA's purpose as confronting massive fraud on the federal government by *private* contractors during the Civil War, *Stevens*, 529 U.S. at 781, 120 S. Ct. at 1867; *United States v. Bornstein*, 423 U.S. 303, 309, 96 S. Ct. 523, 528 (1976); *United States v. McNinch*, 356 U.S. 595, 599, 78 S. Ct. 950, 953 (1958), and as not being "designed to reach every fraud practiced on the Government," *McNinch*, 356 U.S. at 599, 78 S. Ct. at 953, or to reach "all types of *fraudsters*." *Stevens*, 529 U.S. at 781 n.10, 120 S. Ct. at 1867 n.10 (emphasis in the original). Under the standards of

statutory construction, the context of the FCA overcomes the Seventh Circuit's assumption that local governments are "persons" under the FCA.

The text of the original version of the FCA indicates that it was not directed at local governments. The Court observed in *Stevens*: "far from indicating that States were covered, it did not even make clear that private corporations were since it applied only to any person not in the military" and "imposed criminal penalties that included imprisonment." *Id.* at 782, 120 S. Ct. at 1867. The Court's rationale likewise applies to local governments. The reference to military status and imposition of criminal penalties strongly imply that Congress did not consider local governments to be subject to suit under the FCA. *Cf. United States ex rel. Long v. SCS Business & Technical Inst., Inc.*, 173 F.3d 870, 878 (D.C. Cir. 1999) (criminal penalty inconsistent with state liability under FCA).

Moreover, the genesis of the FCA further confirms that local governments were not Congress' target. In its original form, Senate Bill 467 broadly targeted "any person" submitting a false claim. S. 467, 37th Cong. 3d Sess. § 1 (1863). On January 29, 1863, the bill was amended to, among other things, replace the phrase "any person" with the phrase "any person in the land or naval forces" and "any person not in the military." *Id.* at §§ 1, 4. That local governments were not Congress' intended targets in 1863 is evident by its narrowing and refining the scope of Senate Bill 467 prior to passage. Senate Bill 467 also originally included a provision deeming any person contracting with the United States to provide military supplies both a member of the military and subject to court-martial in case of fraud. *Id.* at § 2. Though that provision was ultimately withdrawn from the bill, the fact that Congress was contemplating court-martial of contractors defrauding the military is further proof that local governments were not intended to be subject to liability under the FCA as originally enacted.

Instead of studying the 1863 text and legislative history, the Seventh Circuit turned to a 1986 Senate Committee Report as authority that the 1863 enactment included local governments within its scope. *Chandler*, 277 F.3d at 975. (App. 10a-11a.) The Seventh Circuit distinguished *Stevens'* dismissal of that report as "erroneous," *Stevens*, 529 U.S. at 783 n. 12, 120 S. Ct. at 1868 n.12, by finding it correct with respect to governmental entities that are not "arms of the state itself." *Chandler*, 277 F.3d at 975 n.8. (App. 10a-11a.) *Stevens* did not make such a distinction between States and other governmental entities. Moreover, that report, based on a mistaken interpretation of the original enactment and case law, is likewise erroneous with respect to local governments. *See Dunleavy*, 279 F.3d at 225; *Garibaldi*, 244 F.3d at 489-90 n.3; *Graber*, 8 F. Supp. 2d at 353. Reliance on that report is further suspect because "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *See Wright v. West*, 505 U.S. 277, 295, n.9, 112 S. Ct. 2482, 2492 n.9 (1992) [citation omitted]. The Seventh Circuit's determination that Congress, in 1863, intended local governments to be "persons" subject to the FCA's liability was error.

2. The Seventh Circuit's initial determination that Congress, in 1863, included local governments as "persons" under the FCA tainted its analysis of the 1986 amendments. Not only is the Seventh Circuit's pronouncement that three changes to the FCA enacted in 1986 demonstrate "continued municipal liability," *Chandler*, 277 F.3d at 975, (App. 9a), not borne out by any of those changes, the 1986 amendments, in fact, confirm that local governments were never intended subjects of FCA liability in 1863.

The most significant of the 1986 changes considered by the Seventh Circuit is the increase in the FCA's damages from double to treble. The increase in damages implicates a presumption that both States and local governments enjoy. Indeed, the Court, in holding that the treble damages plus

penalties imposed by the 1986 amendments to the FCA are punitive, reaffirmed the "presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 785 (citing *City of Newport*, 453 U.S. at 262-63, 101 S. Ct. at 2757-58). The Court has, "on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637, 100 S. Ct. 1398, 1408 (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). In *Stevens,* the Court found Congress' imposition of mandatory punitive damages in the 1986 amendments to be further support for the conclusion that States were never included as "persons" under the FCA. *Id.* at 785, 120 S. Ct. at 1869. That reasoning likewise applies to local governments. *See City of Newport*, 453 U.S. at 260 n.20, 101 S. Ct. at 2756 n.20 ("The general rule today is that no punitive damages are allowed [against a municipal entity] unless expressly authorized by statute.").

The heart of the question, then, is what constitutes explicit Congressional intent to impose punitive damages. Nowhere in the text or legislative history of the 1986 amendments to the FCA did Congress explicitly impose the FCA's punitive damages on local governments. For that reason, the Fifth Circuit refused to find that Congress intended to subject municipal entities to liability under the FCA. *Garibaldi*, 244 F.3d at 492 ("Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the FCA."). Also, for that reason, the Third Circuit found: "At best, after considering the text of the statute and its legislative history, we find only ambiguity as to whether Congress intended to disturb the well-settled doctrine of local governmental immunity from punitive damages under the FCA. Ambiguity, however, is not enough . . . to carry the day." *Dunleavy*, 279 F.3d at 225.

The Seventh Circuit, on the other hand, while acknowledging that Congress nowhere explicitly subjected local governments to punitive damages under the FCA, looked for an explicit *exemption* of municipal entities from the FCA's punitive damages and found none. *Chandler*, 277 F.3d at 979 ("When it desires to exempt municipal entities from federal statutory schemes, Congress has not hesitated to do so."). (App. 17a.) In so doing, the Seventh Circuit employed a standard that is at odds with the Court's teachings by ignoring this Court's consistent refusal "to construe the general language of [a statute] as automatically abolishing such traditional immunities by implication." *See City of Newport*, 453 U.S. 247, 258, 101 S. Ct. 2748, 2755. In short, the Seventh Circuit took the well-established presumption against the imposition of punitive damages on local governments absent an explicit indication from Congress and turned it on its head.[4]

The error in the Seventh Circuit's approach is further demonstrated by the policy justifications offered for its view that Congress implicitly imposed punitive damages on local governments. First, the Seventh Circuit distinguished *City of Newport* on the grounds that "there are important differences between [the punitive damages] available under sec. 1983 and those imposed by the FCA." *Chandler*, 277 F.3d at 978. (App. 15a.) The Seventh Circuit reasoned:

> Under the FCA, at least a portion of the recovery will come from the monies taken by the municipality through its false claims, whereas under § 1983 both the

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[4] One federal district court recently "performed an exhaustive search and yet was unable to find any court of appeals decisions, with the exception of the Seventh Circuit's recent decision in Chandler, authorizing an award of punitive damages against a municipality, absent express statutory authority to do so." *Schultzen v. Woodbury Central Community Sch. Dist.*, No. C01-4089-MWB, 2002 U.S. Dist. LEXIS 3010 (N.D. Iowa Feb. 22, 2002).

> compensatory and punitive damages come directly from the tax base. Further, in the FCA context, the taxpayers themselves have been enriched by the fraudulent conduct of the municipality. Presumably any ill-gotten gains from the federal government produce more services or lower taxes. Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit.

Id.[5] The Seventh Circuit's reasoning deviates from this Court's expressed concern with the hardship caused by imposing damages on local taxpayers that are *three times higher than* any amount of ill-gotten gains. *See Stevens*, 529 U.S. at 785 n.15, 120 S. Ct. at 1869 n.15. As the Fifth Circuit noted: "Though a local government can properly be made to pay compensation for the wrongful acts of its agents, punishing a local government is pointless." *Garibaldi*, 244 F.3d at 491.

The Seventh Circuit was also persuaded by the fact that the FCA's damages are not divided into compensatory and punitive, as are the damages under 42 U.S.C. § 1983. *Chandler*, 277 F.3d at 978. (App. 16a.) *Stevens* did not recognize such a distinction between the two statutes, instead noting that both Section 1983 and the FCA are federal laws "designed to benefit the citizens of the United States." *Stevens*, 529 U.S. at 785 n.15, 120 S. Ct. at 1869 n.15 ("[a] better read of *Newport* is that we were concerned with imposing punitive damages on taxpayers under any circumstances"). The Seventh Circuit did not take into consideration that the federal govern-

[5] The Seventh Circuit's reasoning is belied by Relator's own Amended Complaint, which suggests that federal monies were used in a manner that did not produce the intended benefit to the tax-paying public.

ment has available causes of action other than the FCA to recoup damages for any "ill-gotten gains." *See* 31 U.S.C. § 3730(c)(5).

Contrary to the Seventh Circuit's determination, two other changes to the FCA in 1986, in fact, support a conclusion that Congress never intended local governments to be sued under the FCA. In discussing the CID provision at Section 3733 that defines "person" to include "any State or political subdivision of a State . . . for purposes of this section," the Seventh Circuit concluded that "[a]lthough this definition does not demonstrate Congressional intent to impose liability on municipalities, it certainly does not support an inference that Congress intended them to be exempt." *Chandler*, 277 F.3d at 975. (App. 10a.) Yet, applying the Court's reasoning in *Stevens*, Congress' addition of local governments in the CID provision at Section 3733, coupled with its decision not to define "person" in Section 3729 to include local governments, leads to the same conclusion as the Court reached *Stevens* with respect to States, namely, that local governments are not persons for purposes of FCA suits.

The third change to the FCA in 1986 considered by the Seventh Circuit was the whistleblower provision. Although the whistleblower provision uses the word "employer" without defining the term, 31 U.S.C. § 3730(h), the 1986 Senate Committee Report states that "employers" include "public as well as private sector entities." *Chandler*, 277 F.3d at 975 (citing S. Rep. 99-345 at 34-35). (App. 10a-11a.) As noted above, that Senate Committee Report is itself of suspect value, being based on an inaccurate interpretation of the law. *See Garibaldi*, 244 F.3d at 489 n.3; *Graber*, 8 F. Supp. 2d at 353. According to the Seventh Circuit, there would be no reason to subject local governments to whistleblower liability if they were not already subject to FCA liability. However, that is not true. Congress can subject a public entity to liability for retaliation without making that entity subject to

liability under the FCA, because the federal government can pursue remedies independent of Section 3729, such as a cause of action in breach of contract or fraud, or by way of the administrative process. *See* 31 U.S.C. § 3730(c)(5). Moreover, the Seventh Circuit's reasoning here, too, is incompatible with the presumption that punitive damages are not imposed on local governments without an explicit indication from Congress. *See City of Newport*, 453 U.S. at 261, 271, 101 S. Ct. at 2757. Back-dooring liability for local governments through an unrelated provision is not the explicit abrogation of the imposition of punitive damages demanded by *City of Newport*. Taken together, the serious errors in the Seventh Circuit's analysis provide an additional reason for this Court to review the important questions raised in this petition at this time.

Despite the 139-year history of the FCA, local governments have only recently become its frequent targets. As it stands now, local governmental liability under the FCA is directly dependent upon geographic location: the thousands of local governments in the Seventh Circuit are subject to suit under the FCA, while those in the Fifth and Third Circuits are not. Given the profound and potentially catastrophic impact of FCA suits on local governments, the split in the circuits, and the resulting disparate application of the FCA throughout the country, the Court should take this opportunity to resolve this critical issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 00-4110 & 01-1810

UNITED STATES OF AMERICA *ex rel.*,
JANET CHANDLER, Ph.D.,
Plaintiff-Appellant, Cross-Appellee,

v.

COOK COUNTY, ILLINOIS,[1]
Defendant-Appellee, Cross-Appellant.

September 5, 2001, Argued
January 22, 2002, Decided

JUDGES: Before FLAUM, *Chief Judge*, and POSNER and RIPPLE, *Circuit Judges*.

OPINION:

RIPPLE, *Circuit Judge*.

Janet Chandler, Ph.D., brought this *qui tam* action as relator on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 et seq., to recover funds that allegedly were obtained fraudulently by defendants Hektoen Institute for Medical Research ("Hektoen") and Cook County, Illinois, in the administration of a drug treatment program. The district court dismissed the suit against Cook County,

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[1] The Hektoen Institute for Medical Research, a defendant in this action in the district court, filed a motion for non-involvement in this appeal. The court granted that motion.

holding that, as a municipality, the County was immune from punitive damages under the FCA. Dr. Chandler appealed and, for the reasons set forth in this opinion, we reverse in case No. 00-4110.

Cook County also appealed or, in the alternative, requested mandamus, from the district court's discovery order requiring Cook County to turn over certain drug treatment records. We believe the district court's discovery order does not comply with federal privacy regulations. Therefore mandamus will issue requiring the district court to vacate its discovery order and to proceed in conformity with this opinion.

I. BACKGROUND

A. Cook County as a Party

Dr. Janet Chandler brought this *qui tam* action against Hektoen and Cook County for alleged misconduct in their handling of a federal research grant.[2] Cook County Hospital ("CCH") applied for, and received, a $ 5 million grant from the National Institute of Drug Abuse ("NIDA") to study the treatment of drug-dependant pregnant women. Along with its grant application, CCH submitted an assurance of compliance plan to the Department of Health and Human Services ("HHS"), representing that CCH would comply with federal human subject research regulations. The grant initially was awarded to CCH, but was transferred to Hektoen, an affiliate of CCH established to receive funds and conduct medical research. The program was dubbed "New Start"; it was designed to provide treatment and conduct research. New Start provided treatment to drug-dependant pregnant women and studied the effect of a stepped-up battery of medical and

[2] Dr. Chandler initially sued Cook County Hospital in addition to these defendants. The hospital was found to have no identity independent of Cook County and was dismissed from the case. *See United States ex rel. Chandler v. Hektoen Inst.*, 35 F. Supp. 2d 1078, 1086 (N.D. Ill. 1999).

social services on its patients, compared with a control group receiving the typical treatment available in the community.

On September 1, 1993, Dr. Chandler was hired as New Start's project director. While in this post, Dr. Chandler came to believe that the defendants were violating the terms of the grant and federal regulations. Further, she believed they were misrepresenting the success of the New Start program and submitting false progress reports to the government, which included information on "ghost" program participants who did not exist. Dr. Chandler alleged that CCH did not follow mandatory protocol for research on human subjects and for dispensing methadone to pregnant women, did not obtain informed consent from study participants, did not obtain thorough medical or drug histories, provided substandard care, failed to keep accurate records and failed to randomize participants.

In 1994, Dr. Chandler began to speak up, informing physicians at CCH that she was concerned with the handling of the New Start program. She told them that the program was violating the terms of the grant, the assurance of compliance plan and pertinent federal regulations. Ultimately Dr. Chandler was discharged and brought this action. She alleged that CCH retaliated against her by revoking some of her responsibilities and then firing her in January 1995, after she was accused of lying in her report to NIDA on the study's alleged failure.

Cook County moved to dismiss on the ground that it was not a "person" within the meaning of the False Claims Act. *See* 31 U.S.C. § 3729(a).[3] The district court denied Cook

[3] § 3729 provides:

(a) Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the

County's motion to dismiss, holding that the County was a person within the meaning of the FCA. *See Chandler v. Hektoen Inst.*, 35 F. Supp. 2d 1078, 1084 (N.D. Ill. 1999) (*Chandler I*). Specifically, the court was persuaded by the definition of person within the Civil Investigative Demand ("CID") provision of the FCA, added in 1986. *See* 31 U.S.C. § 3733(l)(4); *Chandler I*, 35 F. Supp. 2d at 1084. The statute defines person as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." 31 U.S.C. § 3733(l)(4). The district court further held that the treble damages provision of the FCA was not punitive, so that municipalities' traditional immunity from punitive damages was not implicated. *See Chandler I*, 35 F. Supp. 2d at 1084-85. Therefore, Cook County's motion was denied.

In 2000, the Supreme Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). *Stevens* held that states were not persons within the meaning of the FCA and concluded that the treble damages provision was punitive. *See id.* at 783-84. Cook County filed a motion to reconsider in light of *Stevens*. *See Chandler v. Hektoen Inst.*, 118 F. Supp. 2d 902, 902 (N.D. Ill. 2000) (*Chandler II*). The district court found nothing in *Stevens* to "alter its conclusion

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> Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . .
>
> is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.
>
> 31 U.S.C. § 3729(a).

that the County is a 'person' for purposes of the FCA" but found that "it is quite clear that under *Stevens* the County is immune from the imposition of punitive damages." *Id.* at 903. The court dismissed the case against Cook County.

B. Discovery

Dr. Chandler brought this action on January 27, 1997. She sought the records of the New Start program in discovery. The voluminous records contained *inter alia* physicians' notes, consent forms, medical records, patient questionnaires and drug test results. The County resisted, pointing to federal regulations requiring researchers to keep drug and alcohol treatment records confidential. On January 7, 1999, the district court granted Dr. Chandler's motion to compel and ordered Cook County to produce the records with patient-identifying information redacted. Notice was sent to the former New Start patients, informing them that "Janet Chandler has been given permission by the Court to review your New Start records, so long as all the identifying information and other personal information on the records is blacked out." R.72, Ex.B. The notice also provided the former patients with forms to reply if they wanted to object to the disclosure or if they consented to the disclosure of identifying information. The patients were informed that if they did nothing, the redacted records would be disclosed to Dr. Chandler and her representatives.

Over the next year or so, the parties were contentious about the quality of the redacted records. Dr. Chandler's attorneys claimed that many records were missing or incomplete. There was a problem with the index created by Cook County to obscure patient identifying information in compliance with the court's discovery order. The court ordered the County to produce a "key" to cross-reference original and substituted file numbers because the substituted file numbers could not

be linked with a large quantity of study data. In early 2001, Dr. Chandler went back to the district court seeking access to the unredacted patient records.

On March 5, 2001, the district court ordered Cook County to turn over unredacted patient records to Dr. Chandler's representatives and asked the parties to draft protective orders. On March 14, 2001, the district court entered a protective order governing the disclosure of unredacted patient records to Dr. Chandler's attorneys. The order limited disclosure to three of Dr. Chandler's attorneys and one paralegal for ten days. They were prohibited from disclosing information to anyone, including Dr. Chandler and were not permitted to record any of the information. Cook County sought an emergency stay pending appeal. After briefing from both sides, the motions panel of this court granted the stay on June 12, 2001 and denied Dr. Chandler's motion to dismiss for want of jurisdiction. We consolidated the two appeals.

II. DISCUSSION

The False Claims Act establishes civil penalties for "[a]ny person" who, *inter alia,* "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(1), (3). Such a person "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains be cause of the act of that person." *Id.* § 3729(a). The FCA may be enforced by the Attorney General, *id.* § 3730(a), or by a private person, known as a relator, who brings a *qui tam* suit "for the person and for the United States Government . . . in the name of the Government," *id.* § 3730(b). A *qui tam* suit is filed in camera,

and remains under seal for sixty days. *Id.* § 3730(b)(2). The relator must present all material evidence to the Government; during the sixty day period, the Government may intervene and proceed with the action itself. *Id.* If the Government declines to assume responsibility for the suit, the relator may proceed on his own. *Id.* § 3730(b)(4)(B). If the suit is successful, the relator receives a portion of the Government's award. *Id.* § 3730(d). If the Government takes over, the relator will receive between 15 and 25 percent of the Government's proceeds, "depending upon the extent to which the person substantially contributed to the prosecution of the action," plus reasonable expenses. *Id.* § 3730(d)(1). If the relator proceeds on his own, he will receive between 25 and 30 percent of the proceeds, plus reasonable expenses. *Id.* The *qui tam* relator is also protected by a "whistleblower" provision which provides relief to any employee who suffers retaliation for bringing a claim under the FCA or assisting an employee-relator who does so. *Id.* § 3730(h). The whistleblower protection extends to any relator who brings a claim in good faith, whether or not it is successful.

A.

We must determine whether Cook County is a "person" within the meaning of the FCA.[4]

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[4] Under Illinois law, Cook County is a "home rule" unit. Secretary of State of Illinois, *Illinois Counties & Incorporated Municipalities* 30 (1993); *see also* Ill. Const. Art. VII § 6; *Nevitt v. Langfelder*, 157 Ill. 2d 116, 623 N.E.2d 281, 285 (Ill. 1993) (noting that Cook County and the City of Chicago are the only home rule units in Illinois with populations in excess of 1 million people). "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const. Art. VII, § 6(a). Home rule status is automatically granted to any municipality with a population greater than 25,000 and any county with a chief executive elected by the voters, or any municipality who chooses such status by referendum. *Id.*

The issue is one of statutory interpretation. Therefore we must ascertain the will of Congress; we must determine whether Congress, when it enacted the FCA, intended counties to be defendants in *qui tam* suits.

We begin, as always, with the text of the statute. Congress provides no definition of "person" within § 3729. There have been only cosmetic changes to this section since the FCA was first adopted in 1863; therefore, the definition of person has remained constant throughout the FCA's history. *See Stevens*, 529 U.S. at 783 n.12, 120 S. Ct. 1858. The Supreme Court has noted that, by 1844, both private and municipal corporations were presumptively included within the meaning of "person." *See Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Nowhere in the text is there an exception for suits against municipalities. Nor have the parties suggested any other statutory provision that would limit the text before us.

The structure of the statute does not appear to bar a finding that counties may be sued under the FCA. The FCA creates a mechanism designed to discover and correct fraud against the federal government. In a *qui tam* suit, the relator must inform the Department of Justice of his intention to sue and must keep his suit under seal for sixty days while the Justice Department decides whether to prosecute the action itself.[5] The parties have not suggested anything in the structure of the

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The legislature may preempt the taxing power of a home rule unit by a three-fifths vote of both houses. *See id.* § 6(g). The legislature may also preempt, by ordinary majority vote, "any power or function of a home rule unit other than a taxing power" or certain local improvements and special services. *Id.* §§ 6(h), (l).

[5] There is no reason to presume that a decision by the Justice Department not to assume control of the suit is a commentary on its merits. The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney.

FCA, when read as a whole, that would require anything other than a straight-forward reading of the text.

The 1986 amendments to the FCA did not change the meaning of "person" nor did these legislative changes explicitly include or exclude suits against municipalities. However, three of the changes to the FCA made by Congress in 1986 are relevant to this case. That year, Congress adopted what is now 31 U.S.C. § 3733, which permitted the Attorney General to issue a Civil Investigative Demand ("CID") to "any person" who "may be in possession, custody, or control of any . . . information relevant to a false claims law investigation." *See* 31 U.S.C. § 3733(a)(1). A CID requires its recipient to produce documents, answer interrogatories and give oral testimony. *Id.* Political subdivisions of states were included within the CID provision's definition of "person." *See id.* § 3733(l). Second, Congress adopted a "whistle-blower" statute, protecting relators and their witnesses from retaliation by employers. *See id.* § 3730(h). Finally, Congress increased the penalties for violations, from $2,000 per claim and double damages to $5,000-$10,000 per claim and treble damages. *Id.* § 3729(a)[6]. We believe that a proper understanding of each of these changes points to a finding of continued municipal liability.

The CID provision was added to provide the Justice Department with a new weapon to discover fraud and investigate false claim suits. That section defines "person" as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." *Id.* § 3733(l)(4).[7] The CID's definition of person

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[6] This change shifted the FCA's damages regime from a compensatory system to a punitive one, *see Stevens*, 529 U.S. at 785-86, 120 S. Ct. 1858, thereby implicating municipalities' common-law immunity from punitive damages. *See infra* § II(B).

[7] The Supreme Court in *Stevens* found that this definition militated against a finding that states were within the definition of "person." *See*

at least demonstrates that Congress intended that states and their subdivisions be potential targets of false claim investigations. Although this definition does not demonstrate Congressional intent to impose liability on municipalities, it certainly does not support an inference that Congress intended them to be exempt. Every change made in 1986 made it more likely for FCA claims to be filed and to succeed.

Further, the legislative history of the 1986 amendments, in particular that accompanying the whistleblower provision, makes it likely that the Congress, when voting on the amendments, was aware that the FCA might reach municipalities. The Senate Judiciary Committee's report states that "the False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." S. Rep. 99-345 at 8 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5266, 5273.[8] In discussing the whistleblower provision, the

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Stevens, 529 U.S. at 784, 120 S. Ct. 1858. The court reasoned that if Congress wanted to include states within the ambit of § 3729, it could have provided a similar definition within that provision. *Id.* Given the presumption that States are not included within the definition of "person," "the failure to add States to § 3729 suggests that States are not subject to *qui tam* liability under § 3729." *Id.* at 784 n.14, 120 S. Ct. 1858. Municipalities and other political subdivisions, however, are presumptively within the meaning of "person." Congress' inclusion of "political subdivision of a State" within § 3733's definition of person and its exclusion from § 3729's definitions section does not have the same meaning as Congress' similar action with regard to states. We need not draw the same inference the Supreme Court drew from this aspect of the statute's structure because Cook County does not enjoy the same privilege of place within our constitutional structure enjoyed by states.

[8] The Supreme Court in *Stevens* found this statement to be erroneous. *See Stevens*, 529 U.S. at 783 n.12, 120 S. Ct. 1858. The committee's error, however, was in presuming that "person" in its broad sense included states which, as *Stevens* points out, is not the case. Given the sovereign

Committee report defines "employers" to "include public as well as private sector entities." *See id.* at 34-35. Unless municipalities are subject to suit under the FCA, Congress would have no reason to be concerned that municipalities might retaliate against their employees for bringing FCA claims. Given that states are excluded from the definition of "person" within the FCA, the only public entities remaining are municipal corporations and other political subdivisions of states which are not arms or agencies of state government.

This reading of the 1986 amendments is compatible with other evidence that Congress' purpose in enacting those amendments was to increase the effectiveness of the Act. *See* S. Rep. No. 99-345 at 2 (1986) ("In order to make the statute a more useful tool against fraud in modern times, the Committee believes the statute should be amended in several significant respects. The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward."). Congress also increased the percentage of the Government's proceeds a relator may receive where the Government assumes responsibility for the action. Before 1986, a relator's share was capped at ten percent of the award. *See* 31 U.S.C. § 3729(c)(1) (1983). Now, a court has discretion to give the relator between fifteen and twenty-five percent, but fifteen percent is the minimum award. 31 U.S.C. § 3730(d)(1). Before 1986, if a relator proceeded on his own, his potential

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status of states, Congress must do something more to bring states within the coverage of a federal law than enact a law aimed at "persons," even if that term is used in its broadest sense. *See id.* at 780-81, 120 S. Ct. 1858. The same is not true of municipal corporations and other governmental bodies within state boundaries. Therefore, while the committee report was incorrect with respect to the liability of states under the FCA before 1986, we believe it was correct in asserting that political subdivisions of states were, and are, subject to suit under the FCA so long as they are not properly considered arms of the state itself.

award was capped at twenty-five percent, *see* 31 U.S.C. § 3729(c)(2) (1983); now twenty-five percent is the minimum he would receive, with a maximum of thirty percent. 31 U.S.C. § 3730(d)(2). These changes both encourage *qui tam* suits and encourage cooperation with the Department of Justice.

The 1986 amendments also added several provisions which deter frivolous suits and give courts the discretion to restrict a relator's participation in suits when the Government has intervened. The district court can restrict the relator's participation if he remains in the case for purposes of harassment, 31 U.S.C. § 3730(c)(2)(C); the court may stay discovery if the relator's actions interfere with the Government's investigation, *id.* § 3730(c)(4). If the basis for the suit was information that was already available, a district court may limit a relator's recovery to 10 percent of the award, *id.* § 3730(d)(1), or bar the suit entirely unless the Attorney General prosecutes the case, *id.* § 3730(d)(4)(A). If the relator himself planned or was guilty of violations of the FCA, the court may dismiss his suit. *Id.* § 3730(d)(3). If the relator proceeds with the suit himself and the court finds that the suit was "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment," the court may award the defendant attorneys' fees and expenses. *Id.* § 3730(d)(4). Finally, the FCA bars suits against members of Congress, members of the judiciary and senior executive branch officials. *Id.* § 3730(e)(2). These changes gave courts more discretion to regulate *qui tam* suits and to weed out illegitimate actions.

Congress also changed the knowledge element of the offense, making success more likely. Some confusion had arisen about the standard of intent necessary for a finding of liability under the FCA. Congress adopted § 3729(b) which defines knowing and knowingly to mean that a person "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts

in reckless disregard for the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b). This definition sets a fairly low standard, making it easier for the United States to prevail in FCA actions.

We must conclude that a study of the text and structure of the Act, supported by the available legislative history, leads to the conclusion that Congress intended to include counties within the meaning of "person."

B.

Cook County nevertheless urges that we are prohibited from interpreting the statute to include counties because of the municipalities' traditional, commonlaw immunity from punitive damages. The Supreme Court in *Stevens* stated that, by increasing the damages from double to treble in 1986, the FCA was transformed from a remedial statute to a punitive one. *See Stevens*, 529 U.S. at 785-86, 120 S. Ct. 1858.[9] Because damages under the FCA are now considered to be punitive, we turn to the question of whether Congress has made it sufficiently clear that municipalities do not enjoy the traditional common-law immunity of municipalities from punitive damages for FCA claims.

We begin with the Supreme Court's decision in *City of Newport v. Fact Concerts*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). *See Doe v. County of Centre*, 242 F.3d 437, 454 (3d Cir. 2001) (using *City of Newport* to analyze whether municipalities were immune from punitive damages in suits brought under the Americans with Disabilities Act and the Rehabilitation Act). In *Newport*, the Court was called upon to decide whether a municipality was immune from

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[9] The Supreme Court had held that the double damages recoverable before 1986 were remedial. *See United States v. Bornstein*, 423 U.S. 303, 315, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976).

punitive damages under 42 U.S.C. § 1983. *See Newport*, 453 U.S. at 249, 101 S. Ct. 2748. The Court could find no evidence that Congress intended to disturb the settled common-law immunity of municipalities from punitive judgments. *See id.* at 265, 101 S. Ct. 2748. Under the § 1983 statutory scheme, there is no guidance from Congress as to the damages to be imposed, or to the limits on the amount of punitive damages a jury may assess.

Compensatory damages, designed to make the victim of unconstitutional behavior whole, are a permissible basis of recovery and, although punitive damages, properly calculated, serve many salutary purposes when a truly egregious situation is presented, they remain a windfall for the fully compensated plaintiff. There is always the danger that the "deep pocket" of the municipality's tax base will tempt a jury to succumb to an unprincipled determination. *See Newport*, 453 U.S. at 270, 101 S. Ct. 2748. In light of these factors, the Court in *Newport* found no basis for disregarding the presumption that a municipal entity ought not be subjected to such a liability.

In *Newport*, the court identified a "two-part approach" for "scrutinizing a claim of immunity proffered by a municipality." *Id.* at 259, 101 S. Ct. 2748. Such a claim requires "careful inquiry into considerations of both history and policy" to determine "both the policies that it [the immunity] serves and its compatibility with the purposes" of statutes, *id.* Earlier, in *Owen v. City of Independence*, 445 U.S. 622, 635, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), the Court had noted that "the question of the scope of a municipality's immunity from liability . . . is essentially one of statutory interpretation." For instance, in the context of § 1983, the Court concluded in Newport that immunity from punitive damages was not inconsistent with the purposes of § 1983, *see Newport*, 453 U.S. at 271, 101 S. Ct. 2748; however, in *Owen*, the Court held that municipal immunity based on the

good faith of its officers was inconsistent with § 1983, *see Owen*, 445 U.S. at 657, 100 S. Ct. 1398. In both cases, the Court looked at the fit between the purpose of the asserted immunity and the Congressional intent in enacting § 1983.

Given the Supreme Court's analysis in *Newport*, we must examine the purpose of municipal immunity from punitive damages to determine if it is consistent with the False Claims Act. In the context of section 1983, the Supreme Court wrote in *Newport*: "Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers." *Newport*, 453 U.S. at 263, 101 S. Ct. 2748. Punitive damages are borne by "the very taxpayers and citizens for whose benefit the wrongdoer [is] being chastised." *Id.* Ordinarily, punitive damages "are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* at 267, 101 S. Ct. 2748.

However, not all punitive damage regimes are identical. Indeed, there are important differences between those available under § 1983 and those imposed by the FCA. Under the FCA, at least a portion of the recovery will come from the monies taken by the municipality through its false claims, whereas under § 1983 both the compensatory and punitive damages come directly from the tax base. Further, in the FCA context, the taxpayers themselves have been enriched by the fraudulent conduct of the municipality. Presumably any ill-gotten gains from the federal government produce more services or lower taxes. Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit. Congress' precision in crafting the FCA's damage regime suggests to us that it carefully considered all its options before enacting this particular system. Unlike § 1983, the FCA does not need to borrow a common-law conception

of damages; Congress has provided a clear and consistent remedy for all violations of the FCA. And, unlike under § 1983, we need not worry about the "broad discretion traditionally accorded to juries in assessing the amount of punitive damages," *Newport*, 453 U.S. at 270, 101 S. Ct. 2748, because the FCA affords the judge little discretion in imposing penalties on offenders.

The FCA damages scheme mandated by Congress is not divided into compensatory and punitive damages. Under the FCA, damages are limited to $10,000 per claim plus three times the amount of the false claims. 31 U.S.C. § 3729(a). Although the trebling of the actual loss is indeed a significant enhancement and punitive in nature, it is nevertheless a response specifically determined by Congress as necessary for the effective operation of the FCA. It could not be more clear that Congress, in adopting this approach, addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute. Notably, Congress did make an exception to the general measure of damages when the person who has defrauded the Government cooperates before having learned of the investigation. 31 U.S.C. § 3729(a)(7)(A)-(C). In such a case, the court has discretion to impose double, rather than treble, damages. *Id.* The damages are imposed by the judge, not the jury. *See In re Schimmels*, 85 F.3d 416, 416 n.1 (9th Cir. 1996). By contrast, Congress made no adjustment to the general scheme for municipal entities.

The Supreme Court has noted that the definition of "person" has remained unchanged since the adoption of the FCA in 1863. *See Stevens*, 529 U.S. at 782-83, 120 S. Ct. 1858. As noted above, counties were subject to suit in 1863. Were we to hold counties immune from the FCA's damages scheme, we would frustrate the clear intention of Congress. The original FCA damages regime was remedial. *See United States v. Bornstein*, 423 U.S. 303, 315, 96 S. Ct. 523,

46 L. Ed. 2d 514 (1976). In 1986, in an effort to increase the effectiveness of the FCA, Congress increased the per claim penalty from $2,000 to a minimum of $5,000 and the overall damages from double to treble. To hold that municipalities are immune, we would have to conclude that, in effecting this increase, Congress intended to exempt municipalities from the FCA sub silentio.

Congress was aware of the Court's decisions in *Newport* and *Bornstein*; it was only in 2000 that the Supreme Court characterized the FCA's remedy as punitive. Congress also was aware of the presumption that municipalities are included within the meaning of the term "person," *see Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and that municipalities are treated differently from states within our constitutional system, *see Comm. Communications Corp. v. Boulder*, 455 U.S. 40, 51-53, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982), *superseded by* 15 U.S.C. §§ 34-36; *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394-96, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978), superseded by 15 U.S.C. §§ 34-36. In enacting the 1986 changes to the statute, which form the basis of Cook County's immunity argument, Congress did not indicate in any way that it intended to exempt municipal entities from the scope of the statute. When it desires to exempt municipal entities from federal statutory schemes, Congress has not hesitated to do so. *See, e.g.*, 15 U.S.C. §§ 34-36 (exempting local government units from liability for damages under the antitrust statute); 42 U.S.C. § 1981a(b)(1) (exempting governments from punitive damages under employment discrimination statute).

Dr. Chandler and the United States suggest that, if we hold Cook County to be immune from punitive damages, we ought to hold further that Cook County may still be sued under the FCA, but be held to a lower measure of damages. In our view, the legislative record affords us no justification for

undertaking such judicial blue-penciling of the statute. Congress has provided one remedy for violations of the False Claims Act. If municipalities are immune from punitive damages, then they are, effectively, immune from liability under the FCA. There is no indication that Congress intended the FCA to apply to municipal entities but at a lower penalty. *See United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 493 (5th Cir. 2001). As we have just noted, the penalty scheme is a carefully measured approach by Congress designed to impose a penalty compatible with the objectives of the Act. We therefore must either apply the entire statute to municipal entities or declare them to be exempt under the FCA.

Billions of dollars flow from the federal government to municipalities each year. Congress, in creating, in 1863, and then strengthening, in 1986, a comprehensive mechanism designed to remedy fraud against the federal government clearly determined that recipients of federal funds must be subject to such a deterrent. Given this legislative judgment, municipalities' common-law immunity from suit is inconsistent with Congress' purpose in adopting the FCA. Unlike § 1983, which creates a cause of action without specifying a remedy, the FCA includes a carefully crafted remedy for violations. Accordingly, despite the presumption against the imposition of punitive damages on municipalities, it is clear that Congress, in enacting the 1986 changes to the FCA, made a conscious choice to increase the recoverable damages while in no way indicating that it wished to exempt municipalities. Therefore, the interpretive presumption has been overcome.

C.

Nevertheless, Cook County contends, the Supreme Court's decision in *Stevens* mandates a different result. The district court, as had the Fifth Circuit, *see Garibaldi*, 244 F.3d at 493-94, agreed. We believe that this proposition is unsound and

respectfully disagree with the conclusion reached by our sister circuit.[10] In our view, such a reading of *Stevens* cannot be squared with the essential rationale of that opinion nor with the established doctrinal differences, long recognized in our jurisprudence, between the status of the states of the Union and municipal entities. *See Stevens*, 529 U.S. at 779-80, 120 S. Ct. 1858. *Stevens* quite appropriately recognizes that the states, as sovereign entities within our federal union, must be accorded, in their relationships with the federal government, certain attributes of sovereignty. *Cf., Printz v. United States*, 521 U.S. 898, 918-21, 926-28, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (holding that Congress could not commandeer state executive officers to enforce federal gun control law); *Seminole Tribe v. Florida*, 517 U.S. 44, 55, 70-72, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (holding that Congress cannot abrogate states' 11th Amendment immunity through the powers granted in Article 1 of the federal constitution). Among these attributes is the presumption that states, as sovereigns, are not included within the term "person." *See Stevens*, 529 U.S. at 780, 120 S. Ct. 1858.

The central holding of *Stevens* is that states are not within the FCA's definition of "person" because of the "long-standing interpretive presumption that 'person' does not include the sovereign." *Stevens*, 529 U.S. at 780, 120 S. Ct. 1858. "The presumption is 'particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.'" *Id.* at 781, 120 S. Ct. 1858 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)). This presumption is applied to protect the states because of their dignity as sovereigns within our system of federalism. It is akin to the clear statement rule which requires "that if

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[10] Because our holding on this point creates an intercircuit conflict, this opinion has been circulated to the entire court. Circuit Rule 40(e). No judge in active service has requested a vote to hear this case en banc.

Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will*, 491 U.S. at 65, 109 S. Ct. 2304 (internal citations and quotations omitted). The presumption cuts the other way for municipalities. *See Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The Supreme Court has never imposed this same requirement on Congressional efforts to make municipal entities amenable to federal legislation. *Cf. Bd. of Trustees v. Garrett*, 531 U.S. 356, 368-69, 121 S. Ct. 955, 148 L. Ed. 2d 866 (discussing the different requirements for imposing federal liability on states and municipalities); *Monell*, 436 U.S. at 701, 98 S. Ct. 2018 (stating that absent a clear statement to the contrary, municipalities were presumptively included within the meaning of the term "person"). Such constitutional concerns applicable to states do not apply to municipalities. Therefore, there is no such rule of construction applicable here. *Cf., Garrett*, 531 U.S. at 368-69, 121 S. Ct. 955 ("[Cities and counties] are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part . . . when only the States are the beneficiaries of the Eleventh Amendment."); *Alden v. Maine*, 527 U.S. 706, 756, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) ("The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."). The rationale of *Stevens* simply cannot support the interpretation that Cook County wishes to place on it.

Accordingly, counties are not only amenable to the FCA but also are subject to the same penalties as other defendants.

III

A.

In light of the above discussion, Cook County will once again be a party to this action. We therefore must address its appeal of the district court's discovery order of March 14, 2001. Normally, discovery rulings are unappealable, because the disadvantaged party has a remedy at the end of the district court proceedings.[11] This court has held that a party seeking to obtain appellate review of a discovery order before judgment should accept a contempt citation, and then appeal. *See Allendale Mutual Ins. Co. v. Bull Data Sys. Inc.*, 32 F.3d 1175, 1179 (7th Cir. 1994). "[R]equiring the complaining party to take some risk—to back up his belief with action—winnows weak claims." *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992). However, in extraordinary circumstances, mandamus may be an appropriate remedy where the petitioner can show "irreparable harm . . . and a clear right to the relief sought." *In re Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992). We believe Cook County has made such a showing here.

"Mandamus may not be used to get around the limitations on the appealability of interlocutory orders." *Mulay Plastics, Inc. v. Grand Trunk Western R.R. Co.*, 742 F.2d 369, 371 (7th Cir. 1984). However, the circumstances here present the necessary predicate for such an extraordinary remedy. The district court's discovery order implicates regulations protecting the confidentiality and integrity of federally-funded substance abuse programs. *See* 42 U.S.C. § 290dd-2;

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[11] Because Cook County is reinstated, we need not consider the County's argument that we have jurisdiction under the doctrine of *Dellwood Farms v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997). *Dellwood* held that "[w]hen the [discovery] order is directed against a nonparty, as it is here, he has no appellate remedy at the end of the litigation, so he is allowed to appeal immediately." *Id.* at 1125.

42 C.F.R. §§ 2.11, 2.63-64. If Cook County is correct, allowing Dr. Chandler's representatives to view the unredacted patient records would cause serious harm to those patients' privacy rights and to the federal programs protected by a comprehensive regulatory scheme. Congress and the Department of Health and Human Services have made it clear that regulations are necessary to protect "the patient, the physician-patient relationship, and the treatment programs." *See* 42 C.F.R. § 2.64(d). It is not only the privacy rights of individual patients that are at stake here, but also the continued effectiveness and viability of important substance abuse treatment programs. *See United States v. Smith*, 789 F.2d 196, 205-06 (3d Cir. 1986) (noting that "there is a public interest in maintaining the confidentiality of patient records" in drug and alcohol treatment programs). Patients will be less willing to seek treatment if patient confidentiality is not strictly protected. The First Circuit, in upholding the validity of § 2.63 wrote: "The purpose of [the statute] is clear. Congress recognized that absolute confidentiality is an indispensable prerequisite to successful alcoholism research. Moreover, confidentiality is necessary to encourage successful alcoholism treatment. Without guarantees of confidentiality, many individuals with alcohol problems would be reluctant to participate fully in alcoholism programs." *Whyte v. Conn. Mut. Life Ins. Co.*, 818 F.2d 1005, 1010 (1st Cir. 1987); *see also Mosier v. Am. Home Patient, Inc.*, 170 F. Supp. 2d 1211, 1214 (N.D. Fla. 2001) (noting that "this particular privilege is a strong one"). The same is true of drug treatment. In short, because important private *and* public rights will be irretrievably compromised if the County is correct but the information is nevertheless released prior to the entry of a final judgment, mandamus is an appropriate remedy.

B.

We therefore turn to an assessment of Cook County's contention that the district court's order is violative of the statute and regulations.

Federal law restricts the disclosure of information obtained "in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research" conducted by the United States or with federal money. 42 U.S.C. § 290dd-2. Disclosure is permitted with patient con sent, 42 U.S.C. § 290dd-2(b)(1), or "[i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm," *id.* § 290dd-2(b)(2)(C). "In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. . . . [T]he court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure." *Id.* § 290dd2(b)(2)(C).

The regulations divide information into two categories—confidential and non-confidential communications. The New Start records contain both. In both situations, when a court is preparing to order disclosure, notice must be sent to the patients and they must be afforded "[a]n opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order." 42 C.F.R. § 2.64(b). Such notice must be "adequate." *Id.* Notice was sent in 1999, after the district court's ruling on January 7 of that year granting Dr. Chandler's motion to compel. That notice informed patients that redacted copies of their records would be disclosed to Dr. Chandler's counsel. By contrast, patients have not been notified, and the March 14 order does

not contemplate such notice, that unredacted copies of their records will be disclosed to Dr. Chandler's representatives. To be adequate, notice must inform patients both of the nature of the disclosure and to whom the information will be disclosed. Patients must know what is at stake before they can make an informed decision about their potential intervention in Dr. Chandler's lawsuit. Patients who may not have been concerned enough about the disclosure of redacted records to intervene may well wish to be heard if the court is prepared to order disclosure of unredacted records.

Once notice has been given, with respect to both confidential and other communications, the district court must find that "(1) other ways of obtaining the information are not available or would not be effective; and (2) the public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services." 42 C.F.R. § 2.64(d). If a patient does not consent, confidential communications may only be disclosed by court order if:

> (1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury . . . (2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or (3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of confidential communications.

42 C.F.R. § 2.63(a). Because none of those conditions apply here, any confidential communications must be redacted before Dr. Chandler's representatives may view the records.

The district court's discovery order violates these regulations. It permits four individuals, three of Dr. Chandler's attorneys and a paralegal, to view all of the records for ten days. It places no restrictions on the type of information that will be made available to them. The statute and regulations do not contemplate even limited disclosure of non-confidential communications without notice or of confidential communications without one of the conditions of § 2.64 being satisfied.[12] Dr. Chandler maintains that she has no need to view confidential materials, therefore, the court should be able to craft an order which satisfies both the regulations and Dr. Chandler's legitimate need to view some of the non-confidential communications.

Mandamus will issue requiring the district court to vacate its discovery order. Given the lapse of time between the 1999 notice and the disclosure, new notice should be sent to all patients whose records might be examined by Dr. Chandler's representatives. Further, notice must be sufficiently clear that the New Start patients will understand, without the aid of counsel, what is at stake and what they must do to assert their rights. No disclosure may be made until sufficient time has passed to give the patients an opportunity to decide whether to intervene and to seek legal assistance.

Conclusion

Cook County is a person within the meaning of the False Claims Act and does not enjoy immunity from the FCA's

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[12] The regulations provide that:

> Disclose or disclosure means a communication of patient identifying information, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

42 C.F.R. § 2.11.

damages scheme. Therefore, the district court's decision in 00-4110 is REVERSED and the case is REMANDED with orders to reinstate Cook County as a party to this action. The district court's discovery order runs afoul of federal privacy regulations and violates important private rights and public policies. Therefore, MANDAMUS will issue in 01-1810, and the district court is ordered to enter a new protective order consistent with this opinion. Each party shall bear its own costs in these appeals.

No. 00-4110 REVERSED and REMANDED.

No. 01-1810 MANDAMUS ISSUED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 514

UNITED STATES OF AMERICA *ex rel.*,
JANET CHANDLER, Ph.D.,
Plaintiff,

v.

THE HEKTOEN INSTITUTE FOR MEDICAL RESEARCH
and COOK COUNTY, ILLINOIS,
Defendants.

October 30, 2000, Decided
November 1, 2000, Docketed

JUDGE: ROBERT W. GETTLEMAN, *United States District Judge.*

OPINION AND ORDER

Plaintiff/relator, Janet Chandler, has brought this qui tam action on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. The claims and the facts of the case are described in the court's previous opinion, *U.S. ex rel. Chandler v. Hektoen Institute*, 35 F. Supp. 2d 1078 ("*Chandler I*"), and will not be repeated here.

In *Chandler I*, the court dismissed defendant Cook County Hospital, and denied the remaining defendants' motions to dismiss, finding that, (1) Cook County was a "person" for purposes of the FCA, and that the FCA's treble damages provision is compensatory rather than punitive. *Id.*, at 1086.

Cook County has filed a motion to reconsider those conclusions in light of the recent decision in *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 1858, 120 S. Ct. 1858, 144 L. Ed. 2d 836 (2000), issued after this court's ruling *Chandler I*, in which the Supreme Court held that a state is not a "person" subject to qui tam liability under the FCA, and that the treble damages provisions of the FCA are (contrary to this court's holding in *Chandler I*) punitive rather than compensatory. *Id.*, 120 S. Ct. at 1869; *see also Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617 (7th Cir. 2000). The court ordered briefing by the parties, and allowed the United States to file an amicus curiae brief in support of plaintiff's position.

Although this court finds no reason to alter its conclusion that the County is a "person" for purposes of the FCA, it is quite clear that under *Stevens* the County is immune from the imposition of punitive damages, which are mandatory if liability is found under the FCA. Plaintiff and the United States argue that, assuming the court reaches this conclusion, the court would be authorized to award lesser damages in order to allow this case to be continued against the County, suggesting that the court could award double damages (which have been held to be remedial rather than punitive; *see United States v. Bornstein*, 423 U.S. 303, 315, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976)). The court agrees with the County, however, that the court has no authority to rewrite the FCA in such a manner. As noted by the *Stevens* Court, the FCA allows a reduction in the mandatory treble damages only in certain instances, none of which are present in the instant case. *See Stevens*, 120 S. Ct. at 1869, n. 16.

The arguments advanced by plaintiff and the United States in the instant case were recently presented to and rejected by the United States District Court for the Eastern District of Pennsylvania. In a well-reasoned decision, which this court

adopts, Judge O'Neill, relying on *Stevens* and noting this court's earlier decision in *Chandler I*, held that the treble damages mandated by the FCA are punitive and may not be imposed on a county. *United States ex. rel. Dunleavy v. The County of Delaware*, 2000 WL 1522854, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa., Oct. 12, 2000). This court cannot improve on Judge O'Neill's reasoning, and therefore concludes that the County is immune from prosecution under the FCA because it is immune from any award or claim for punitive damages.

Accordingly, Cook County's motion to reconsider the ruling of February 8, 1999, is granted, and this action is dismissed with prejudice against the County. This matter is set for a report on status regarding the remaining defendant on November 2, 2000, at 9:00 a.m.

ENTER: October 30, 2000

Robert W. Gettleman
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 514

UNITED STATES OF AMERICA *ex rel.*
JANET CHANDLER, Ph.D.,
Plaintiff,

v.

THE HEKTOEN INSTITUTE FOR MEDICAL RESEARCH;
COOK COUNTY HOSPITAL; and COOK COUNTY, ILLINOIS,
Defendants.

February 8, 1999, Decided
February 9, 1999, Docketed

JUDGE: ROBERT W. GETTLEMAN, *United States District Judge.*

MEMORANDUM OPINION AND ORDER

Relator/plaintiff Janet Chandler ("plaintiff") has brought a three-count complaint against defendants the Hektoen Institute for Medical Research ("Hektoen"), Cook County Hospital ("CCH"), and Cook County (together, "the County Defendants"). Plaintiff alleges: (1) presentation of false claims in violation of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. (Count I); (2) retaliation in violation of the FCA (Count II); and (3) retaliatory discharge in violation of Illinois law and public policy (Count III). Defendant Hektoen moves to dismiss Counts I and III, arguing that: (1) the FCA's qui tam provisions are unconstitutional; and (2) plaintiff does not allege that Hektoen's actions violated clearly established Illinois public policy. Hektoen has also moved for an extension of time in which to answer Count II, pending the court's decision on the County Defendants' motion to dismiss Count II. The United States has filed an amicus brief in opposition to Hektoen's argument that the qui tam provisions of the FCA are unconstitutional.

The County Defendants have likewise filed a motion to dismiss the complaint, arguing that: (1) CCH is not a suable entity under Illinois law; (2) Count II fails to state a claim against the County Defendants because plaintiff was employed by Hektoen, not by the County; (3) the County Defendants are immune from punitive damages for Count III; (4) Count III fails to state a claim for retaliatory discharge; and (5) the qui tam provisions of the FCA are unconstitutional. The County Defendants have filed a supplemental motion to dismiss, arguing that they are not "persons" who can be sued under the FCA.[1]

FACTS

This action arises out of defendants'[2] alleged misconduct in implementing a federal research grant. In 1989, the National Institute of Drug Abuse ("NIDA") issued a request for proposals for a study investigating the treatment of drug-dependant pregnant women. In response, CCH submitted a

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[1] On January 7, 1999, the court issued an opinion compelling defendants to produce certain documents and denying defendants' request that the court stay its discovery decision pending its decision on defendants' motions to dismiss. On January 13, 1999, the County Defendants filed a Motion for Reconsideration of a portion of the court's January 7 opinion, requesting that the court stay discovery pending its decision on the immunity claim defendants raised in their supplemental motion to dismiss.

[2] The court does not differentiate between Hektoen and the County Defendants when discussing parts of plaintiff's complaint where she uses the term "defendants" to refer jointly to all defendants.

grant application seeking $5 million to study 300 such women over the course of five years (the "New Start study"). CCH also submitted an Assurance of Compliance plan to a division of the United States Department of Health and Human Services ("HHS"). In this plan, CCH represented that its study would comply with federal regulations governing research on human subjects. NIDA initially awarded the grant to CCH (which developed the protocol to be used in performing the study), and later transferred the administration of the grant to Hektoen. Plaintiff was hired by Hektoen as New Start's project director on September 1, 1993.

The federal grant had two components. The clinical component was designed to provide the research subjects with a comprehensive medical and social service program that included drug treatment and prenatal care. The research component was designed to study whether the research subjects had benefitted from the comprehensive treatment program.

Plaintiff alleges that during her employ, she became aware that defendants were not complying with the terms of the grant or with federal regulations and were misrepresenting the progress of the New Start study. Specifically, plaintiff alleges that defendants: did not follow the mandatory protocol associated with research on human subjects and the dispensing of methadone to pregnant women; did not obtain informed consent from study participants; did not obtain thorough medical or drug histories from the participants; provided the participants with substandard care; failed to keep accurate records; and failed to randomize participants. Plaintiff also alleges that defendants reported "ghost" research subjects and submitted false progress reports to the government. Finally, plaintiff alleges that defendants violated the grant and federal law because they did not have procedures in place to protect whistleblowers from retaliation.

Plaintiff alleges that in 1994, she began informing doctors employed by CCH of her concerns that the study was violating the terms of the grant, the Assurance of Compliance plan, and federal regulations. She alleges that after reporting her concerns, Dr. Mason, an employee of CCH, rescinded a number of her responsibilities. Plaintiff also alleges that Hektoen retaliated against her by recalculating her vacation and sick time. According to plaintiff, after she reported in a draft of her paper for NIDA that the study had not been successful, she was further chastised by employees of both CCH and Hektoen. On January 24, 1995, John Prochaska ("Prochaska"), the administrator of Hektoen, accused plaintiff of lying in her monograph on the study and fired her. On February 21, 1995, plaintiff was formally removed as co-principal investigator of the study. Plaintiff subsequently testified at an HHS Commission on Research Integrity hearing, and in August 1996, a subdivision of HHS issued a report on the research conducted by CCH and Hektoen that identified "multiple failures to comply with requirements of the HHS human subjects regulations."

DISCUSSION

I. Defendant Hektoen's Motions

A. Motion to Dismiss Count I

Hektoen moves to dismiss Count I on the grounds that the qui tam provisions of the FCA are unconstitutional.[3] Hektoen argues: (1) qui tam relators do not have Article III standing to bring an FCA claim; (2) the qui tam provisions violate separation of powers principles by encroaching on the authority of the executive branch, U.S. Const., Art II, § 3; and (3) the qui tam provisions violate the Constitution's Appointments Clause, U.S. Const., Art II, § 2. Defendants rely

[3] The County Defendants incorporate this argument by reference in their motion to dismiss.

primarily on the reasoning of a lone decision from the Eastern District of Texas, *United States ex rel. Riley v. St. Luke's Episcopal Hospital*, 982 F. Supp. 1261 (S.D. Tex. 1997). The overwhelming majority of courts that have considered the issue have upheld the qui tam provisions of the FCA in the face of identical constitutional challenges.

1. Standing

Defendants argue that plaintiff does not have Article III standing to bring suit under the qui tam provisions of the FCA because she does not allege an injury-in-fact, one of the three elements of Article III standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The Seventh Circuit has held that because the United States is the real party in interest in a qui tam action, a relator has standing to pursue the suit as long as the federal government has suffered an injury-in-fact. *See United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1214 (7th Cir. 1995) ("It is enough . . . that the United States, as the entity on whose behalf and in whose name this suit was brought, has suffered an injury in fact under Article III. Requiring an additional showing of injury on the part of the qui tam relator would be an analytical redundancy.").

Although defendants acknowledge the existence of *Hall*, they urge this court to abjure binding precedent in favor of the reasoning of *Riley*, a district court decision from another circuit that explicitly disagreed with *Hall*. *See Riley*, 982 F. Supp. at 1266. Defendants also argue that *Hall* is not binding on this court because it did not arise under the FCA. However, *Hall* relied on FCA cases to draw its ultimate conclusion that qui tam relators need not demonstrate an injury-in-fact. *See Hall*, 49 F.3d at 1214 (quoting the Second Circuit's holding in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993): "[i]n a qui tam action [under the False Claims Act], the plaintiff sues on behalf of and in the name of the

government and invokes the standing of the government resulting from the fraud injury."). The FCA comports with the principle that "if an injured person assigns his right of action to someone else, the assignee has standing to enforce the right even though he is not the one who was injured by the defendant's wrongdoing." *National Ass'n of Realtors v. National Real Estate Ass'n, Inc.*, 894 F.2d 937, 941 (7th Cir. 1990).

Other courts have used similar reasoning to hold that qui tam relators have standing to bring suit under the FCA. *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) ("the FCA effectively assigns the government's claims to *qui tam* plaintiffs such as *Kelly*, who then may sue based upon an injury to the federal treasury."); *United States ex rel. Lamers v. City of Green Bay*, 924 F. Supp. 96, 98 (W.D. Wis. 1996) (agreeing with *Kelly*); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 836 (N.D. Ill. 1993) ("Congress . . . can transfer the rights of the United States to private citizens, and because it did just that through the FCA, plaintiffs have standing to sue."). The court finds that plaintiff has standing to bring this suit.

2. Separation of Powers

Hektoen also argues that the FCA's qui tam provisions violate the principle of separation of powers because they grant Congress exclusive control over executive functions. Article II vests the executive branch with the power to execute the laws. Because the FCA includes a number of provisions that enable the executive branch to maintain control over qui tam suits, the statute does not arrogate the executive function to Congress. Section 3730(b)(2) explicitly gives the Attorney General the authority to intervene and protect the interests of the executive branch, and § 3730(c)(2) gives the government the authority to dismiss or settle the action even if the relator objects. Although Hektoen argues that the government no longer retains control over the present

litigation because it has declined to intervene, the FCA grants the government the right to intervene at any time upon a showing of good cause. *See* 31 U.S.C. § 3730(c)(3).

This court follows the vast majority of courts that have considered this issue and finds that the FCA does not run afoul of the separation of powers doctrine. *See United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *Kelly*, 9 F.3d at 755 ("[T]he FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns."); *Kreindler*, 985 F.2d at 1155 ("[T]he FCA qui tam provisions do not usurp the executive branch's litigating function because the statute gives the executive branch substantial control over the litigation."); *see also Robinson*, 824 F. Supp. at 837. *But see Riley*, 982 F. Supp. at 1269 n.5 (noting in a footnote that "the qui tam provisions of the False Claims Act also raise serious constitutional concerns as to whether Congress may delegate the executive powers of law enforcement to private parties . . .").

3. Appointments Clause

Finally, Hektoen argues that the FCA's qui tam provisions violate the Appointments Clause, which vests the executive branch with the exclusive power to appoint officers to execute the laws of the United States. Numerous other courts have held that qui tam relators are not officers within the meaning of the Appointments Clause. *See, e.g., Taxpayers Against Fraud*, 41 F.3d at 1041 (holding that relators are not "officers" because the government may take control of such cases whenever it wishes, and because the relator's position is without tenure or continuous duties); *Kelly*, 9 F.3d 743, 757 (holding that unappointed qui tam relators do not wield so much governmental power that their appointments must conform to the requirements of the Appointments Clause);

Robinson, 824 F. Supp. 830, 836 (holding that relators are not officers because they seek to vindicate not only public rights, but their own private rights as well).

Hektoen argues that qui tam relators are officers by analogizing them to special prosecutors. The court notes that the Seventh Circuit has likewise analogized relators to prosecutors, *see Hall*, 49 F.3d at 1213, and has never expressed any concern that these private parties are "officers" appointed by Congress in violation of the Appointments Clause. The court finds that relators are unlike prosecutors because they are suing to protect private rights, not just the public interest, and because they stand to reap private financial gain. Moreover, because the government retains the right to intervene in a relator's suit at any time, relators do not wield enough governmental power to be officers under the Appointments Clause. The court finds that the FCA's qui tam relator provisions are constitutional, and therefore denies Hektoen's and the County Defendant's motions to dismiss Count I.

B. Motion to Dismiss Count III

Hektoen moves to dismiss Count III of plaintiff's complaint, arguing that plaintiff cannot state a claim for retaliatory discharge under Illinois law. Hektoen asserts that plaintiff does not allege a violation of a clearly mandated public policy, and that even if she could allege such a violation, the FCA provides her with an adequate remedy.

An employee can state a claim for retaliatory discharge only if she can demonstrate that she was terminated in retaliation for her actions, and that the discharge contravenes a clear mandate of public policy. *See Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353 (1978). "[P]ublic policy . . . is to be found in the State's constitution and statutes and,

when they are silent, in its judicial decisions." *Palmateer*, 85 Ill. 2d at 130, 52 Ill. Dec. 13, 421 N.E.2d 876. A plaintiff can survive a motion to dismiss only if she can show that the cited provision embodies a public policy and that the plaintiff's termination violates this public policy. *See Callozzo v. Office Depot, Inc.*, 1998 WL 111628, at *2 (N.D. Ill. Mar. 6, 1998) (citing *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 527, 88 Ill. Dec. 628, 478 N.E.2d 1354 (1985)).

Although plaintiff alleges retaliatory discharge, she does not identify the source of the public policy that defendants allegedly violated in terminating her. Plaintiff has not cited any statutory, constitutional, or other provision in her complaint. Rather, she merely alleges that she was terminated because she took steps to promote the health and safety of the research subjects, their fetuses, their offspring, and the public at large. Efforts to promote health and safety, standing alone, are not enough to make out a claim for retaliatory discharge. In *United States ex rel. Dihu v. IIT Research Institute*, 1998 WL 299390 (N.D. Ill. May 21, 1998), for example, a plaintiff brought an FCA claim and alleged retaliatory termination under both the FCA and state law. Although the plaintiff was concerned that certain practices at IIT were jeopardizing the health and safety of the workers, the only provision he cited was an internal Army regulation. *See id.* at *8. The court held that the plaintiff did not state a claim for retaliatory discharge because the regulations he cited did not have enough of a widespread impact on the state's citizens to embody public policy. *See id.* Plaintiff must invoke a rule that defendants violated in terminating her in order for the court to evaluate whether the violation of that rule violates state public policy.

Plaintiff may be attempting to argue that her termination contravened a public policy embodied in the FCA. However, the Illinois Supreme Court generally finds that only those statutes that impact the health and safety of citizens in general truly express public policy. *See Hamros v. Bethany Homes*

and Methodist Hosp. of Chicago, 894 F. Supp. 1176, 1179 (N.D. Ill. 1995) (citing cases). Plaintiff does not argue that the FCA affects the health and welfare of citizens in general. The intent of the FCA is to protect the federal government, not individual citizens. Moreover, plaintiff does not advance any state law or public policy that prohibits fraud against the federal government. *See, e.g., Adler v. Continental Ins. Co.*, 1996 WL 677085, at *10 (D. Kan. Nov. 1, 1996) (finding that alleged retaliation in violation of the FCA did not contravene Kansas public policy because "there is no clearly established Kansas public policy aimed at preventing fraud against the federal government").

Even if plaintiff could properly allege that her discharge violated some clearly mandated state public policy, the court finds that Illinois courts would not expand the tort of retaliatory discharge to this case because the remedies embodied in the FCA serve as an adequate deterrent to future employer misconduct. As this court explained in *Hamros*: "Historically, courts have recognized the [retaliatory discharge] claim where the otherwise available remedies would not serve as an effective deterrent . . . ." 894 F. Supp. at 1179 (citing cases). Plaintiff argues that the Seventh Circuit has allowed plaintiffs to proceed with state retaliatory discharge claims that are supported by the same facts as federal claims, citing *Wright v. Illinois Dep't of Children & Family Services*, 40 F.3d 1492, 1508 (7th Cir. 1994) (arising under § 1983); and *Gooden v. Neal*, 17 F.3d 925, 929 (7th Cir. 1994). *Gooden* held that the plaintiff's retaliatory discharge claim was distinct from his First Amendment claim. *See* 17 F.3d at 929 ("To prevail under state law Gooden did not have to establish that his reports were protected speech, and the tort of retaliatory discharge in Illinois has not developed in precisely the same way as constitutional torts . . . .").

Unlike the First Amendment, the FCA contains a specific provision that punishes employers who discharge employees

in retaliation for exercising their rights under the statute. See § 3730(h). In this respect the FCA is analogous to the FMLA, which this court and other courts have held provides a remedy that adequately deters retaliatory discharge. *See Callozzo*, 1998 WL 111628, at *5; *Hamros*, 894 F. Supp. at 1179. Like the FMLA, the FCA provides for a number of statutory remedies, including liquidated damages (in the form of a double back pay award) designed to deter the employer from future unlawful conduct. *See Hamros*, 894 F. Supp. at 1179; *see also Dihu*, 1998 WL 299390, at *8 ("In this case, Dihu's Illinois claim essentially mirrors his retaliatory discharge claim under § 3730(h) of the FCA, and thus recognition of the Illinois common law claim is not necessary for Dihu to obtain the relief he seeks"). The court concludes that plaintiff has failed to demonstrate that her discharge controverts established Illinois public policy, and that even if she had shown a violation of public policy, the FCA provides her with an adequate remedy. The court grants Hektoen's motion to dismiss Count III of plaintiff's complaint.

II. County Defendants' Motions

A. Supplemental Motion to Dismiss FCA Claims (Counts I and II)

The County Defendants argue that they cannot be sued under the FCA because: (1) the County is not a "person" under the FCA; and (2) the FCA's treble damages provision is punitive, and municipalities are exempt from punitive damages. Defendants rely primarily on a New York district court decision, *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998). Although this is a case of first impression in this circuit, the weight of authority in other circuits holds that states are persons within the meaning of the FCA and that the FCA's treble damages provision is not punitive.

1. The County is a "Person" Under the FCA

The court considers two factors in determining whether the County is a "person" under the FCA: (1) the text of the statute; and (2) its legislative history. The statute renders liable "any person who" submits false claims to the federal government. 31 U.S.C. § 3729(a). The FCA does not define the term "person" as used in § 3729(a). However, the civil investigative demand provision of the act includes in its definition of person "any State or political subdivision of a State." 31 U.S.C. § 3733(1)(4). In addition, courts have interpreted the statute to include states among the "person[s]" who may file qui tam actions under § 3730(b). *See, e.g., United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 205 (2d Cir. 1998) (holding that in light of the legislative history of § 3730(b), "Congress viewed the States as persons who could be qui tam plaintiffs"); *United States ex rel. Woodard and State of Colorado v. Country View Care Center, Inc.*, 797 F.2d 888, 893 (10th Cir. 1986); *United States ex rel. Hartigan and State of Illinois v. Palumbo Brothers, Inc.*, 797 F. Supp. 624, 631 (N.D. Ill. 1992) ("We conclude that the FCA was specifically amended to provide jurisdiction for qui tam plaintiffs like Illinois.").

The court concludes that Congress intended the word "person" to have the same meaning in each section in which it is used. *See Commissioner v. Lundy*, 516 U.S. 235, 250, 116 S. Ct. 647, 133 L. Ed. 2d 611 (1996) (applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal citations omitted). The text of the statute and other federal courts' interpretation thereof suggest that states and their political subdivisions are "person[s]" under § 3729(a). *Accord Stevens*, 162 F.3d at 205; *United*

States ex rel. Zissler v. Regents of the University of Minnesota, 154 F.3d 870, 875 (8th Cir. 1998).[4]

The legislative history of the FCA likewise suggests that Congress intended to include states and other units of local government as "persons" who can be sued under the act. The Senate Report accompanying the 1986 amendments to the FCA, in a section describing the history of the act, states: "The False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." S. Rep. No. 99-345, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273-74. Other courts have held that this language indicates that Congress interpreted the FCA as applying to states and other local governments. *Stevens*, 162 F.3d at 207; *Zissler*, 154 F.3d at 874-75; *United States ex rel. Long v. SCS Business & Technical Institute*, 999 F. Supp. 78, 85 (D.D.C. 1998). The County Defendants rely heavily on *Graber*, the one case that has held otherwise. The district court's decision in that case, however, was issued after *Stevens* had been argued but before the Second Circuit issued its opinion, which effectively overruled *Graber* by holding that the FCA applied to states and local governments.[5]

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[4] Only *Graber* has held that states were not "person[s]" who could be sued under the act, and even *Graber* conceded that "[e]ither proffered construction arguably would be consistent with the text of the statute." 8 F. Supp. 2d at 355. Moreover, *Graber* relies on the district court's decision in *Zissler*, which was reversed by the Eighth Circuit on appeal as cited above.

[5] The district court in *Graber*, after a thorough analysis of the caselaw referenced in the Senate Report, concluded that the report was incorrect because it misinterpreted that caselaw. *Id.* at 352. Regardless of whether Congress misunderstood the way courts had interpreted the term "person" before the 1986 amendments, however, "this understanding was that the False Claims Act applied to the States, and would, after the 1986 amendments, continue to apply to the states." *Zissler*, 154 F.3d at 874-75.

2. The Damages Imposed by the FCA Are Not Punitive

The County Defendants argue that even if the County is a "person" under § 3729, the County is immune from suit under the FCA because the act imposes punitive damages. The Supreme Court has held that municipalities are immune from punitive damages in § 1983 suits. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). The Court found that imposing punitive liability on municipalities does not fulfill the traditional purposes of punitive damages, deterrence and retribution. *Id.* 453 U.S. at 267-71, 101 S. Ct. 2748.[6] Defendants concede that the Supreme Court has held that the FCA is not a punitive statute. *See, e.g., United States v. Halper*, 490 U.S. 435, 449, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) (holding that the FCA's "fixed-penalty-plus-double-damages provisions" does not, in most cases, constitute punishment for the purposes of double jeopardy), *overruled on other grounds by Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (rejecting *Halper*'s definition of "punishment" in the double jeopardy context because double jeopardy merely prohibits the imposition of additional criminal sanctions, not of all additional sanctions that might be termed punishments); *United States v. Bornstein*, 423 U.S. 303, 314-15, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52, 63 S. Ct. 379, 87 L. Ed. 443 (1943) ("[T]he chief purpose of the statute[] here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure

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[6] The parties do not dispute that City of Newport applies to counties as well as municipalities. *See Erwin v. County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989) ("On a custom and policy claim a governmental body such as the County cannot be held liable under 42 U.S.C. § 1983 for punitive damages.").

that the government would be made completely whole."). Defendants argue, however, that the foregoing cases are no longer apt, because they were decided before the 1986 amendments to the FCA. According to the County Defendants, Congress transformed the FCA into a punitive statute by revising its damages provisions to allow for treble damages rather than a fixed penalty plus double damages.

Although the Seventh Circuit has yet to address the issue, a number of other circuit and district courts have held that the FCA's treble damages provision is not punitive. *See, e.g., Stevens*, 162 F.3d at 207; *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996); *United States v. Barnette*, 10 F.3d 1553, 1559-60 (11th Cir. 1994); *Long*, 999 F. Supp. at 85-86. *But see Graber*, 8 F. Supp. 2d at 349. The Supreme Court has held that the federal government "is entitled to rough remedial justice." *Halper*, 490 U.S. at 446, 109 S. Ct. 1892. *Halper* reasoned that the multiple recovery allowed under the FCA was compensatory, not punitive, because it was rationally related to the government's loss. *Id.* 490 U.S. at 449, 109 S. Ct. 1892.

Under *Halper*, "proportionality is the key." *Barnette*, 10 F.3d at 1560. The compensation the government requested in *Halper* was vastly disproportionate to its losses: Although the government had suffered only $16,000 in actual damages, it requested an additional fine of $130,000, a ratio of 8 to 1. *See Barnette*, 10 F.3d at 1560 (discussing *Halper*, 490 U.S. at 452, 109 S. Ct. 1892). In the present case, plaintiff claims $5 million in actual damages to the government and seeks $15 million in compensation, plus between $5,000 and $10,000 per false claim, far less than the ratio in *Halper*. Raising the stakes from double to treble damages does not render the relationship between loss and recovery irrational in the present case. *See Brekke*, 97 F.3d at 1048 (holding that a post-amendment FCA case was compensatory and not punitive) ("We do not see how the treble damages provision of the False Claims Act is different from the 'ordinary case' discussed in *Halper*," the case in which the damages were a fixed penalty plus double damages); *Barnette*, 10 F.3d at 1560 (holding that a 3.2 to 1 ratio of compensation to actual damages is not punitive).

In an attempt to argue that the FCA's treble damages provisions are penal, the County Defendants analogize the statute to the civil Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. Both RICO and the antitrust laws authorize treble damages. The Seventh Circuit has held that "a treble damage antitrust suit is most appropriately characterized as an action for a penalty," and has likewise held that "[b]ecause a civil RICO claim is best characterized as an action for treble damages, . . . such an action is penal in nature." *Tellis v. United States Fidelity & Guaranty Co.*, 805 F.2d 741, 746 (7th Cir. 1986), *vacated Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987). However, the Seventh Circuit has addressed the nature of treble damages in antitrust and RICO actions for the narrow purpose of electing the state statute of limitations to apply to such actions. *See, e.g., id.* (holding that because civil RICO is penal in nature, Illinois' two-year statute of limitations for actions based on a statutory penalty applies to civil RICO claims); *Schiffman Bros. v. Texas Co.*, 196 F.2d 695, 696 (7th Cir. 1952) ("[T]he real question facing us, therefore, was not whether the action was one to recover a statutory penalty within the meaning of any federal statute but whether actions such as this are limited to a period of two years under the Illinois statutes. . . . We are not concerned at all, then, with anything other than the question of what statute of limitations of Illinois is applicable to actions to recover treble damages.").

The Seventh Circuit has never held that treble damages are, by definition, punitive. *See, e.g., Adler v. Northern Hotel Co.*, 175 F.2d 619 (7th Cir. 1949) (holding that treble damages under the Housing and Rent Act are remedial in nature). The

reach of *Tellis*' holding is further undermined by language in *Agency Holding Corp.*, which held that the Clayton Act's four-year statute of limitations applies to RICO claims as well, overruling *Tellis* and other cases that had applied state law statutes of limitations to RICO claims. *See Agency Holding Corp.*, 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121. *Agency Holding Corp.* described RICO and the Clayton Act as "designed to *remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees," and explained that "both statutes aim to *compensate* the same type of injury." *Id.* 483 U.S. at 151, 107 S. Ct. 2759 (emphasis added). The Court's use of compensatory, rather than punitive, language to discuss the purpose of civil RICO and the antitrust laws suggests that the two statutes' treble damages provisions are not wholly punitive in nature.

Finally, according to the legislative history, the purpose of the 1986 amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government" and "to make the statute a more useful tool against fraud in modern times." S. Rep. No. 99-345, at 1, *reprinted in* 1986 U.S.C.C.A.N 5266; *see also Zissler*, 154 F.3d at 874. These broad goals suggest that Congress did not intend to place beyond the reach of the statute a large class of potential wrongdoers—municipalities, counties, and other units of local government. Taking the allegations of the complaint as true for the purposes of the present motion to dismiss, the County defendants fall within this class of wrongdoers.

The court finds that: (1) the County is a "person" for the purposes of the FCA; and (2) the FCA's treble damages provision is more compensatory than punitive. *See Stevens*, 162 F.3d at 207; *Zissler*, 154 F.3d at 875; *Taxpayers Against Fraud*, 999 F. Supp. at 78; *see also Brekke*, 97 F.3d at 1048 ("A multiple recovery of this type is compensatory rather than punitive, even though it contains a penalty element . . . ."). The FCA applies to the County.

B. Motion to Dismiss CCH

The County Defendants move to dismiss CCH from the complaint because the hospital does not have a legal existence separate from that of Cook County. *See Payne v. Cook County Hosp.*, 719 F. Supp. 730, 734 (N.D. Ill. 1989). Because Cook County is the appropriate defendant in this action, the court grants the motion to dismiss the hospital as a separate defendant.

C. Motion to Dismiss FCA Retaliatory Discharge Claim (Count II)

The County Defendants move to dismiss Count II, arguing that it does not state a claim against them. The FCA's retaliatory discharge provision reads:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h). The County Defendants argue that plaintiff cannot state a claim under § 3730(h) because she does not allege that she was employed by the County.

Plaintiff does not allege sufficient facts from which the court can infer that the County Defendants were her employers. Plaintiff alleges that Hektoen hired her as the New Start project director on October 1, 1993, that she was employed by Hektoen, and that Prochaska, Hektoen's administrator, ultimately fired her. Although plaintiff alleges that Dr. Mason, an employee of CCH, removed medical and

childcare matters from plaintiff's responsibilities as project director, these allegations do not prove that CCH was plaintiff's employer.

At best, plaintiff alleges that Dr. Mason conspired with Hektoen to retaliate against plaintiff. The County Defendants cite a well-reasoned district court case holding that § 3730(h) liability cannot be extended to non-employers on the basis of a conspiracy. *See Mruz v. Caring, Inc.*, 991 F. Supp. 701, 709 (D.N.J. 1998). The court agrees that the plain language of § 3730(h) "reflects a legislative intent to operate exclusively in the area of the 'employment relationship.'" *Id.* at 708. Although plaintiff argues that Cook County should be liable for the acts of its employees whether or not they are key decisionmakers, she does not establish as an initial matter that Cook County or any of its employees were her "employer" under the plain language of the statute. The County Defendants' motion to dismiss Count II is granted.

D. Motion to Dismiss State Law Retaliation Claim (Count III)

The County Defendants move to dismiss Count III of plaintiff's complaint, arguing that plaintiff cannot state a claim for retaliatory discharge under Illinois law. The County Defendants also move to strike from Count III plaintiff's request for punitive damages against them. Because the court has found that plaintiff cannot state a retaliatory discharge claim and that she does not allege that the County Defendants employed her, the County Defendants' motions are granted.

CONCLUSION

The court denies Hektoen's and the County Defendants' motions to dismiss Count I on the ground that the FCA's qui tam provisions are unconstitutional. The court likewise denies the County Defendants' supplemental motion to dismiss Count I against them on the ground that they are not suable "persons" under the FCA.

The court grants the County Defendants' motion to dismiss CCH because Cook County is the appropriate defendant in this action. Because plaintiff does not allege that she was employed by the County, the court grants the County Defendants' motion to dismiss Count II against them. Finally, the Court grants Hektoen's and the County Defendants' motions to dismiss Count III because plaintiff does not allege that her discharge violated clearly established Illinois public policy.

The court declines to stay discovery pending Cook County's appeal of the court's immunity decision. This case is already two years old. Moreover, this case will proceed against Hektoen regardless of the outcome of an appeal by the County. Even if the County were not a party to this suit, the documents plaintiff requests would be subject to subpoena, and as a non-party the County would have no claim of immunity.

February 8, 1999

Robert W. Gettleman
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

May 18, 1999

Before HON. JOHN L. COFFEY, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 99-1415

JANET CHANDLER, Doctor,
Plaintiff-Appellee,

v.

COOK COUNTY, ILLINOIS
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 97 C 514—Robert W. Gettleman, Judge

ORDER

On consideration of the jurisdictional papers, submitted by the parties,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction. Cook County seeks to appeal an interlocutory order denying its motion to dismiss. There is no arguable immunity issue and no basis for appellate jurisdiction over Cook County's appeal. Cook County must await a final decision in order to appeal.

APPENDIX E

528 U.S. 931, 145 L.Ed.2d 257
120 S. Ct. 329

Oct. 12, 1999

No. 99-266

COOK COUNTY,
Petitioner,

v.

JANET CHANDLER,
Defendant.

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

(2)

Supreme Court, U.S.
FILED
MAY 31 2002
OFFICE OF THE CLERK

No. 01-1572

In the

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pgs

QUESTION PRESENTED

Whether local government entities are subject to *qui tam* actions under the False Claims Act. 31 U.S.C. §3729.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for writ of *certiorari* seeking review of the Seventh Circuit's decision in this case. The opinion of the Seventh Circuit (App. 1a-26a[1]) is reported at 277 F.3d 969 (7th Cir. 2002).

STATEMENT OF THE CASE

A. Background

This lawsuit involves claims brought by respondent under the False Claims Act ("FCA"), 31 U.S.C. §3729, against petitioner, Cook County, Illinois, and Hektoen Institute for Medical Research ("Hektoen"). Petitioner's description of the serious false claims allegations made against it by respondent is incomplete and might be taken to suggest that petitioner's involvement in those false claims was minimal. In fact, petitioner—through Cook County Hospital ("CCH"), which it owns and operates[2]—was actively involved in the operation of the grant and the related false claims at issue here from beginning to end. In March, 1989, CCH was awarded $5,000,000.00 in federal funds from the National Institute of Drug Abuse ("NIDA"), to implement a research study of at least 300 drug-dependent pregnant women.

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[1] Citations to the petition for *certiorari* will be in the form of "Pet. __"; citations to the appendix to the petition will be in the form of "App. __."

[2] The district court dismissed CCH as a defendant because it has no "legal existence separate from that of Cook County." App. 47a.

The women were to be randomly assigned either to a comprehensive "one-stop" medical and social service program provided by CCH or to substance-abuse and medical services otherwise available within the community. Amended Complaint, at ¶¶1-3.

By August, 1993, CCH had fallen far short of its commitment, enrolling fewer than half the required number of women. CCH was placed on probation and was given until December, 1993 to demonstrate significant improvement in enrollment or lose its funding. *Id.*, at ¶67. In response, CCH agreed to transfer administration of the grant to Hektoen, a private non-profit affiliate of CCH, organized for the purpose of receiving grants and administering research programs.[3] *Id.*, at ¶26. Dr. Ellen Mason, an employee of CCH, became the principal investigator, and the research continued to be performed by CCH. *Id.*, at ¶¶69-72. In December, 1993, CCH reported that 205 research subjects were enrolled and randomly assigned. In truth, however, at least 45 of these "research subjects" were "ghosts"—persons not enrolled in the program. *Id.* Dr. Mason directed that the "ghosts" not be disclosed to NIDA, and refused to adjust the enrollment figure. *Id.*, at ¶70. As a result of CCH's false claim of significant progress, NIDA lifted CCH's probation. Seven months later, CCH and Hektoen sought, and received, additional funding based on CCH's claim that 87 births were expected from patients who could no

[3] Respondent, Dr. Janet Chandler, worked for Hektoen as the project director of the grant. Although respondent's wrongful termination claim against Cook County was dismissed on the grounds that Cook County was not her employer, App. 47a-48a, respondent's retaliatory discharge claim against Hektoen under the FCA is ongoing. Amended Complaint, at ¶¶112-16.

longer be part of the study if the grant were not extended. *Id.*, ¶72. In truth, however, only seven research subjects were pregnant. *Id.* As a result of its false claims, therefore, petitioner received over $5,000,000.00 in federal funds.

B. The Statutory Structure and *Stevens*

The FCA, as amended, establishes civil penalties for "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. §§3729(a)(1), (3). In 1986, the statute was amended, *inter alia*, to increase the damages that may be awarded from double damages to treble damages. A person who violates §3729 is "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." §3729(a). A private individual, called a relator, can bring a *qui tam* action for these damages in the government's name. 31 U.S.C. §3730(b)(1).

The Court has held that states are not persons within the meaning of §3729 and so cannot be subject to liability under that section. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Despite many amendments to the FCA over the years, the Court held that "the term 'person' has remained in the statute unchanged since 1863." *Id.*, at 1868, n. 12. Pointing to the "longstanding presumption that 'person' does not include the sovereign," the Court then held that this presumption could be "disregarded only upon some

affirmative showing to the contrary." *Id.*, at 1867. Because the original statute's liability provision "bore no indication that states were subject to its penalties," the presumption that states were not "persons" controlled. *Id.*

The Court then turned to the 1986 amendments for evidence that Congress intended to broaden the original Act's coverage to include states. *Id.*, at 1868-70. It concluded that nothing in the text or legislative history of the 1986 amendments indicated a congressional intent to "modify or expand" the term "person" to include states. To reinforce this conclusion, the majority noted that "the current version of the FCA imposes [treble] damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities," citing *City of Newport v. Fact Concert, Inc.*, 453 U.S. 247 (1981). For this and other reasons, the Court held that states are not persons under the FCA and so cannot be held liable.

C. Proceedings Below

The analytic framework of the Seventh Circuit's opinion tracks *Stevens*. Like the Court in *Stevens*, the Seventh Circuit began with the central issue of whether local units of government are persons within the meaning of the FCA. *U.S. ex rel. Chandler v. Cook County*, 277 F.3d 969, 974 (2002); App. 8a. Following the Court's holding that the term "person" remained unchanged throughout the FCA's history, the Seventh Circuit considered the text and legislative history of the original Act as enacted in 1863. Because by 1844 (almost two decades before the FCA), both private and municipal corporations (unlike

states) were presumptively included within the meaning of persons, *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89 (1978), the Seventh Circuit held that local governments (unlike states) were intended, under the original Act, to be "persons" under the FCA. *Id.*

Next, the Seventh Circuit, like *Stevens*, examined the 1986 amendments and found no congressional intent to change the longstanding meaning of the word "person" under §3729 to exclude local units of government. *Id.*, at 974; App. 9a. Indeed, the Seventh Circuit held that three different aspects of the 1986 amendments "point[ ] to a finding of continued municipal liability." *Id.* Specifically, the court looked to (a) the Civil Investigative Demand ("CID") provision, 31 U.S.C. §3733(a)(1), which provides the Department of Justice with a new weapon to discover fraud and which defines person to include states and local subdivisions, *id.*, at 975; App. 9a-10a; (b) the "whistleblower" provision protecting relators and witnesses from retaliation by employers, including, according to the Senate Judiciary Committee report, public-sector employers, *id.*; App. 10a-11a; and (c) other changes which make it easier and more likely that *qui tam* actions will be brought, including the increased damages and changes in the damages allocation between the relator and the government. *Id.*, at 976; App. 11a-12a. Based on its review of these changes, the Seventh Circuit concluded that Congress knew both that municipalities were subject to liability under the Act, and that its main goal in enacting the 1986 amendments was to make "it more likely for FCA claims to be filed and to succeed." *Id.*, at 975; App. 10a, 13a. Nothing about the 1986 amendments supports a conclusion they exempted municipalities from liability. To the contrary, the Seventh Circuit concluded, "Congress intended to include counties within the meaning of 'persons.'" *Id.*; App. 13a.

Despite this conclusion, the Seventh Circuit separately considered "whether Congress has made it sufficiently clear that municipalities do not enjoy the traditional common-law immunity of municipalities" from the type of "essentially punitive" treble damages provided by the 1986 Amendments to the FCA. *Id.*, at 976-77; App. 13a. Here again, the Seventh Circuit found the answer in the approach specified by the Court. *Id.*, citing *Newport*, 435 U.S. 247. Just as the court in *Stevens* focused on Congress' intent in passing and amending the FCA, so, too, the court in *Newport* sought to identify Congress' intent in enacting the Civil Rights Act of 1871.

The specific issue in *Newport* was whether punitive damages were recoverable against a local government in a lawsuit brought under 42 U.S.C. §1983. Section 1983, however, made no provision for damages. *Id.*, at 977; App. 14a. The Court therefore examined the historical context and legislative history of the Civil Rights Act of 1871 to determine Congress' intent. The Court could find no evidence that Congress intended to disturb local governments' common-law immunity from punitive damages. *Newport*, 453 U.S. at 265. And it concluded, based on the policy considerations motivating §1983, that municipal liability for punitive damages would not serve the statute's primary purposes of compensation and deterrence. *Id.*, at 267-71.

The Seventh Circuit followed *Newport*'s lead by examining the claim of immunity for municipalities and its "compatibility with the purpose" of the FCA. *Chandler*, 277 F.3d at 977; App. 14a, quoting 453 U.S. at 259. In so doing, the Seventh Circuit recognized "important differences between [the damages] available under §1983 and those imposed by the FCA." *Id.*, at 978; App. 15a. First, "[u]nlike §1983, the FCA does not need to borrow a

common-law conception of damages; Congress has provided a clear and consistent remedy for all violations of the FCA." *Id.*, at 978; App. 15a-16a. Furthermore, the remedy mandated is not divided into compensatory and punitive damages, but instead calls for a trebling of actual loss which, while "punitive in nature . . . is nevertheless a response specifically determined by Congress as necessary for the effective operation of the FCA." *Id.*; App. 16a. As the Seventh Circuit reasoned:

> It could not be more clear that Congress, in adopting this approach, addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute. Notably, Congress did make an exception to the general measure of damages when the person who defrauded the Government cooperates before having learned of the investigation. 31 U.S.C. §3729(a)(7)(A)-(C). . . . By contrast, Congress made no adjustment to the general scheme for municipal entities.

Id.; App. 16a. Thus, the Seventh Circuit concluded, "[t]o hold that municipalities are immune, we would have to conclude that, in effecting the increase [in damages], Congress intended to exempt municipalities from the FCA *sub silentio*." *Id.*, at 979; App. 17a.

The Seventh Circuit also recognized that the "important differences between the punitive damages available under §1983 and those imposed by the FCA" mitigate the risks discussed in *Newport*. *Id.*, at 978; App. 15a. Specifically, under the FCA, (a) the treble damages are imposed by a judge and, by definition, have a specific upper limit that is rationally related to the federal government's loss, *id.*, at 978; App. 15a-16a; and (b) a por-

tion of the recovery comes from the monies taken by the local government through its false claim, and "the local taxpayers have already received, without justification, some of the benefit." *Id.*; App. 15a.

In sum, the Seventh Circuit explained, Congress has not changed the definition of "person" since the adoption of the original FCA. *Id.*, at 978; App. 16a. Second, Congress knew in 1986 both that municipalities were covered by the original FCA and that "[b]illions of dollars flow from the federal government to municipalities each year." *Id.*, at 980; App. 18a. This knowledge, combined with Congress' focused effort in 1986 to "strengthen . . . [the FCA's] comprehensive mechanism designed to remedy fraud against the federal government," establish that Congress in no way intended to exempt municipalities from the FCA, *sub silentio*, when it increased the damages from double to treble. *Id.* App. 17a.

REASON FOR DENYING THE WRIT

Petitioner's argument for why this Court should grant *certiorari* rests on three principle reasons: (1) a shallow circuit split, in which no court has yet considered the reasoning of the Seventh Circuit; (2) the important and recurrent nature of the issue; and (3) petitioner's attack on the careful and thorough Seventh Circuit opinion itself. As respondent will now show, none of these reasons warrant a grant of *certiorari*.

I. The circuit split is shallow and subject to change.

If ever there were an issue where further percolation was warranted, this is it. The split here is very shallow, as only three circuit courts have even considered the

question of whether local governments are subject to *qui tam* actions under the False Claims Act. Of those three, only the Seventh Circuit conducted a thorough analysis of the reasoning of *Stevens* to hold in the instant case that local governments are subject to such suits. Neither of the other two courts to decide the question—the Third and the Fifth Circuits, each of which ruled that local governments are not subject to such suits—addressed the Seventh Circuit's analysis,[4] or, for that matter, follow *Stevens*. *See Garibaldi*, 244 F.3d 486 ("much of the reasoning in the [*Stevens*] opinion [is not] particularly instructive in resolving the issue presented" because *Stevens* rested on the "interpretive presumption that the term 'person' does not include the sovereign" while "local governments do not enjoy the same sovereign status as states"); *Dunleavy*, 279 F.3d 219. Both *Garibaldi* and *Dunleavy* fail to account for the presumptive meaning of "person" in 1863 in light of *Stevens'* holding that the word "person" in the FCA means what it did in 1863.

Other courts of appeals will soon have the opportunity to address the issue. Appeals involving the question are currently pending in both the Eleventh and D.C. Circuits. *See United States ex rel. King v. Jackson County Hospital Corp.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001), appeal pending, No. 02-11471-A (11th Cir.), and

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[4] The Fifth Circuit ruled before the Seventh Circuit did. *See United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (5th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 808 (2002). The Third Circuit's opinion, *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002), issued only a week after the Seventh Circuit issued its opinion, neither cited the Seventh Circuit opinion nor addressed any of its arguments.

United States ex rel. K&R Limited Partnership v. Massachusetts Housing Finance Agency, 154 F.Supp.2d 19 (D.D.C. 2001), appeal pending, No. 02-5043 (D.C. Cir.). And as petitioner itself pointed out, Pet. at 15-19, the issue has arisen frequently in district courts around the country, making it very likely that even more circuits will be considering the issue in the near future.

Each of these courts will have the opportunity to do what the Third and Fifth Circuits did not do—consider and respond to the Seventh Circuit's reasoning and analysis. And since the Seventh Circuit is the only court of appeals to recognize that the reasoning and holdings of *Stevens* and *Newport* dictate the answer to the issue presented here, the currently-shallow circuit split may well resolve itself as the other courts of appeals consider the Seventh Circuit analysis. *See* Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986), at 199, n. 30 (noting that *certiorari* may not be warranted where "further litigation . . . might produce a consensus or a satisfactory majority view among the lower courts").[5]

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[5] Further percolation is also warranted because the development of other, related issues, may inform the resolution of this one. The *Garibaldi*, *Dunleavy*, and *Chandler* courts all concluded that imposing liability on municipalities but limiting that liability to non-punitive damages was not allowed by the statute. *Chandler*, 277 F.3d at 979; app. 18a; *Dunleavy*, 279 F.3d at 225; *Garibaldi*, 244 F.3d at 493. But such a remittitur may in fact be found permissible and warranted by other courts. *See United States v. Mackby*, 261 F.3d 821, 829-31 (9th Cir. 2001) (remanding the treble damages and $550,000.00 in penalties for an excessive-fine analysis under the 8th Amendment); *United States v. Halper*, 490 U.S. 435, 448-50 (1989) (approving the reduction of a damage award under the FCA to

(continued...)

II. The issue is recurrent and so this Court will have many opportunities to address it, should this Court's intervention ultimately be necessary.

Petitioner's argument about the recurrent nature of this issue is actually an argument against granting *certiorari* at this time. As we have already explained, two courts of appeals are poised to decide the issue and as petitioner itself pointed out, the issue has been widely addressed in the district courts. Pet. at 15-17. Should the courts of appeals themselves fail to resolve this issue, this Court will undoubtedly have other opportunities to step in.

III. The Seventh Circuit's decision is correct.

Contrary to Petitioner's claims that the Seventh Circuit's decision is "manifestly incorrect." Pet. 21, the Seventh Circuit faithfully followed the holdings of this Court and carefully analyzed the text and legislative history of the False Claims Act, both in its original form and after its more recent amendments. As we will now show, each of petitioner's arguments are wrong.

Petitioner claims that the Seventh Circuit was wrong to conclude that the word "person" was intended by the Congress in 1863 to include municipal corporations. Petitioner relies on four arguments to support this claim and entirely ignores the holdings and structure of *Stevens* and other opinions of this Court.

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[5] (...continued)
less than the full double damages mandated by the Act to avoid double jeopardy where the defendant already faced criminal sanctions), overruled on other grounds, *Hudson v. United States*, 522 U.S. 93 (1997).

First, petitioner argues that Congress' particular concern in 1863 to pursue fraud committed by private contractors during the Civil War creates a "context" in which the word "person" should not have its presumptive meaning. Pet. 21. But as this Court has held and the Seventh Circuit noted, "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person.'" App. 8a, citing *Monell*, 436 U.S. at 685-89 (1978). During this period, "municipal corporations were routinely sued in the federal courts," *id.*, at 688; *see also id.*, at 673, n. 28 (citing *Board of Com'rs v. Aspinwall*, 65 U.S. (24 How.) 376 (1860), "and this fact was well known to members of Congress," *id.*, at 688, n. 50. An expressed concern in the legislative history for one type of fraud cannot overcome this presumption. *Cf. Stevens*, 529 U.S. at 1867-68.

Second, petitioner argues that the text of the FCA was not intended to apply to municipalities because it originally applied only to "any person not in the military" and included imprisonment as one of its possible penalties. Pet. 22. In making this argument, petitioner relies on *Stevens*' comment that aspects of the FCA's text "did not even make clear that private corporations," as opposed to natural persons only, were subject to its liability. But *Stevens* itself rejected this argument, accepting that §3729 extends to corporations "because the presumption with regard to corporations is . . . [that] they are presumptively *covered* by the term 'person'. . . ." 529 U.S. at 1868 (emphasis in the original).

Third, petitioner relies on legislative provisions that Congress *rejected*—provisions that would have restricted liability to members of the military or that would have subjected contractors who submitted false claims to court-martial. Pet. 22. These provisions, having been

rejected by Congress, offer little or no guidance into the meaning of the statute actually enacted. If anything, they establish the opposite of what petitioner argues—Congress rejected efforts to narrow the meaning of "person" and instead intended to rely on the broad presumptive meaning of the word.

Finally, petitioner criticizes the Seventh Circuit for considering the 1986 amendments and their legislative history. Specifically, petitioner argues that the 1986 Senate Report, which explains that the word person was intended to be given a broad meaning, must be disregarded in its entirety. Pet. 23. Neither reason petitioner gives for this argument holds water. Although petitioner is correct that *Stevens* found that the report erroneously stated that the 1863 meaning of the term "person" included states, 529 U.S. at 783, n. 12, nothing in *Stevens* suggests that the report was in error in any other respect. And while petitioner is likewise correct that the report's postenactment legislative history, is limited authority for the intent of the 1863 Congress, petitioner misrepresents the Seventh Circuit's use of the report. The Seventh Circuit relied on the report, as well as on other aspects of the 1986 amendments, to establish not what Congress intended in 1863, but, rather, to confirm that Congress in 1986 understood that municipalities were covered by the FCA and did not attempt to restrict or eliminate that coverage.[6] *Chandler*, 277 F.3d at 974-76; App. 8a-12a.

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[6] See, Senate Report, 99-345 (1986) ("Fraud permeates generally all government programs ranging from Welfare to . . . disaster relief programs."). Major disaster and emergency assistance programs are administered through states and local governments. 42 U.S.C. §5141 *et seq*.

Petitioner next claims that the 1986 amendments that the Seventh Circuit discussed establish that the 1863 Congress in fact did not intend for municipal corporations to be covered by §3729. Again, petitioner's arguments in support of this claim are simply wrong.

First, petitioner points to the change from double to treble damages, arguing that the Seventh Circuit erred by looking for an explicit exemption from damages, instead of looking for an affirmative sign that Congress intended to impose punitive damages on municipalities. Pet. 24-25. This argument, of course, has nothing whatsoever to do with the intent of the 1863 Congress, despite petitioner's assertion that it does. It is really an argument that when Congress increased the FCA's damages in 1986, it must be found to have repealed municipal liability *sub silentio*. After all, *Stevens* held that the meaning of "person" has remained unchanged, and *Stevens* held that the meaning of person in 1863 is based on the presumptive meaning of the word as it was understood at that time, which, the Court has held, included municipal corporations. *Monell*, 436 U.S. at 685-89. The Seventh Circuit precisely followed those teachings, and it established through careful examination of the 1986 legislative history and amendments, that Congress was aware that municipalities were indeed covered. Under those circumstances, the Seventh Circuit was quite correct in looking for a sign that Congress actually meant to eliminate municipal liability when it enacted the treble-damages provision.

Petitioner also takes issue with the Seventh Circuit's explanations for why some of the reasoning of *Newport*, which held that a municipality could not be subject to punitive damages under §1983, does not apply to the quite different damages regime of the FCA. Pet. 25-27.

Newport, of course, involved a statute that had no damages provision, so it applied the "common-law immunity of municipalities from punitive judgement." *Chandler*, 277 F.3d at 977; App. 14a. Here, in contrast, Congress has created a carefully-structured damages regime that (1) makes runaway verdicts against municipal "deep pockets" impossible; (2) recoups at least some of the damages from the monies provided to the municipality by the federal government instead of taking all damages, compensatory and otherwise, directly from the local taxpayers; (3) provides some measure of deterrence for politically-accountable municipal officials to defraud the federal government; and (4) ensures full compensation to the United States. These differences in the damages regimes are evidence of a different congressional intent in enacting the 1986 amendments than in enacting §1983. The Seventh Circuit appropriately relied on these differences to determine Congress' intent, not to make its own policy judgments about the merits of the FCA's damages provisions.

Third, petitioner takes issue with the Seventh Circuit's discussion of the explicit inclusion of municipal corporations in the CID provision of §3733, relying on *Stevens*' holding that the inclusion of states in this provision suggests that states are *not* included in §3729. But as *Stevens* itself explicitly pointed out, the CID provision included all sorts of entities clearly covered by §3729, including "any natural person, partnership, corporation, association, or other legal entity." 529 U.S. at 784, n. 14. The difference between states and all of these other entities is that states are presumptively not "persons," and all the others presumptively are. *Id. Stevens* thus entirely supports the Seventh Circuit's holding.

Finally, petitioner complains that the Seventh Circuit should not have relied on the Senate Report's explanation that the new whistleblower provision of the FCA covers public as well as private employers. Pet. 27. The Seventh Circuit reasoned that there would be no need to protect whistleblowers employed by public entities if such public entities were not covered by the FCA. *Chandler*, 277 F.3d at 975; App. 10a-11a. Petitioner counters with an elaborate argument about the other ways the federal government could impose liability on municipal corporations, which might well call for whistleblower protections, and argues that the Seventh Circuit should not "back door" municipal liability by looking to an "unrelated provision." Pet. 28. These arguments once again misconstrue the Seventh Circuit's reasoning. The Seventh Circuit does not suggest that the legislative history of the whistleblower provision, standing alone, would be sufficient to impose punitive damages on municipalities in a newly-enacted piece of legislation. Rather, the whistleblower provision and its history are support for the Seventh Circuit's conclusions that when Congress increased the damages from double to treble in a more-than-century-old statute, it was well aware that government entities were subject to liability and had no intention of repealing that liability *sub silentio*.[7]

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[7] As suggested *supra*, at 10 n. 5, even if the Court determined that the "essentially punitive" treble damages could not be imposed on municipalities, it could still honor congressional intent by subjecting them to the double damages (and $2,000.00 civil penalty) previously found to be compensatory. *United States v. Bornstein*, 423 U.S. 303, 315 (1976). To do so would preserve the intended coverage of the FCA and is consistent with the Court's precedent. *See Halper*, 490 U.S. at 448-50.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

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No. 01-1572

IN THE

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COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Petitioner, Cook County, Illinois ("Cook County"), respectfully submits this reply brief in further support of its petition for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit entered on January 22, 2002 in *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7th Cir. 2002). A reply brief is warranted because Respondent misstates the true breadth of the conflict between the circuits and raises an issue regarding the Seventh Circuit's decision that was not addressed in Cook County's petition.

I. THE PATENT AND IRRECONCILABLE CONFLICT CURRENTLY IN THE CIRCUITS IS WELL-DEFINED AND RIPE FOR RESOLUTION.

Respondent, Janet Chandler, Ph.D. ("Relator"), misstates the true breadth of the current split in the circuits. In fact, the conflict could not be more patent. As it stands today, the thousands of local governments within the Fifth and Third Circuits are not subject to the False Claims Act ("FCA"), *see United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486 (5th Cir. 2001), *cert. denied,* 122 S. Ct. 808, *rhg. denied,* 122 S. Ct. 1198 (2002); *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002), *rhg. denied,* No. 00-3691 (Feb. 22, 2002), *petition for cert. filed,* No. 01-1711 (May 20, 2002), while the thousands of local governments in the Seventh Circuit are subject to the FCA and its attendant punitive damages and statutory fines. This disparity in the application of the FCA to local governments throughout the United States will not change by waiting for additional circuits to consider the question presented in Cook County's petition. Regardless of how other circuits weigh in, the split is now as fundamental and deep as it will ever get: either a local government is subject to liability under the FCA or it is not.

The current split in the circuits on local governmental liability is strikingly similar to the split in the circuits when the Court granted *certiorari* in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), to decide the issue of FCA liability vis-à-vis States. There, the Second and Eighth Circuits had held that States could be sued under the FCA, while the D.C. and Fifth Circuits held that they could not. *See United States ex rel. Stevens v. Vermont Agency of Natural Resources,* 162 F.3d 195 (2d Cir. 1998) (FCA suits against States are not barred by the Eleventh Amendment and States are "persons" under the

FCA), *rev'd*, 529 U.S. 765 (2000); *United States ex rel. Zissler v. Regents of the Univ. of Minnesota,* 154 F.3d 870 (8th Cir. 1998) (States are persons under the FCA); *United States ex rel. Long v. SCS Business and Technical Inst.*, 173 F.3d 870 (D.C. Cir. 1999) (States are not persons subject to FCA suits), *cert. denied*, 530 U.S. 1202 (2000); *United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279 (5th Cir. 1999) (Eleventh Amendment bars *qui tam* actions against States), *rhg. denied*, 1999 U.S. App. LEXIS 14660 (5th Cir. June 1, 1999), *cert. denied*, 530 U.S. 1202 (2000). Consequently, there is nothing shallow about the current split in the circuits. The federal courts and local governments throughout the United States need guidance from the Court now.

II. THE SEVENTH CIRCUIT'S CONCLUSION THAT A SUABLE "PERSON" UNDER THE 1863 ENACTMENT OF THE FCA INCLUDED LOCAL GOVERNMENTS IS BASED ON A MISINTERPRETATION OF *MONELL* AND THE ORIGIN OF MUNICIPAL LIABILITY.

In her response brief, Relator insists that the Seventh Circuit's reliance on *Monell v. Department of Soc. Serv. of City of New York*, 436 U.S. 658 (1978), for its proposition that "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person'" is proper. *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969, 974 (7th Cir. 2002). (App. 8a.) The Seventh Circuit, however, misread the *Monell* Court's timeline regarding the inclusion of local governments as "persons" subject to suit in federal court. A proper reading of *Monell* leads to the conclusion that local governments were not considered "persons" in 1863, when the FCA was originally enacted.

In *Monell*, the Court observed that, under *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809), corporations were not considered "persons." *Monell*, 436 U.S. at 687. The *Deveaux* doctrine was abandoned in 1844 when the Court held, in *Louisville R. Co. v. Letson*, 2 How. 497 (1844), that a '"corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person.'" *Id.* at 687-88 (quoting *Letson*, 2 How. at 558). It was not until 1869, however, that "the *Letson* principal was automatically and without discussion extended to municipal corporations." *Id.* at 688 (citing *Cowles v. Mercer County*, 7 Wall. 118, 121 (1869)). In other words, local governments were not considered "persons" until six years after the FCA was originally enacted in 1863.

Relator's citation to *Board of Com'rs v. Aspinwall*, 65 U.S. (24 How.) 376 (1860), does not prove otherwise. *Aspinwall* merely decided that the federal court had the authority to issue a writ of *mandamus* to county commissioners to perform their duty in complying with a court order. *Aspinwall*, 65 U.S. at 384-85. The *Aspinwall* Court did not consider whether local governments were "persons" for purposes of suits in federal court, nor has Relator cited any cases that illustrate that local governments were considered "persons" subject to suit in federal court prior to the enactment of the FCA in 1863. Rather, Relator's citation to *Monell* for the proposition that "municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress," *Monell*, 436 U.S. at 688, refers to the period after the Court decided *Cowles v. Mercer County* in 1869 and before Congress enacted Section 1983 in 1871. *See id.*

The presumption upon which the Seventh Circuit relied, that local governments are "persons" subject to suit in federal court, simply did not exist in 1863 when the FCA was enacted. Both the absence of a presumption and the context

of the enactment, which was to confront massive fraud on the federal government by *private* contractors during the Civil War, *see Stevens*, 529 U.S. at 781, with no legislative history remotely suggesting an intent to target local governments, confirm that the Seventh Circuit's entire analysis was founded on a faulty premise.

This Court should grant Cook County's petition in order to resolve the very serious conflict among the circuits that creates a disparate application of the FCA to local governments throughout the United States and to address the errors in the Seventh Circuit's analysis.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, as well as for the reasons set forth in the briefs filed by the *amici curiae*, the petition should be granted.

Respectfully submitted,

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Petitioner,

v.

UNITED STATES *EX REL.* JANET CHANDLER, Ph.D.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS, THE GRADY HEALTH SYSTEM, THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, THE MEMORIAL HEALTH CARE SYSTEM, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, AND THE RIVERSIDE COUNTY REGIONAL MEDICAL CENTER IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(a) of the Rules of this Court on written consent of all parties filed with the Clerk of this Court concurrently with this brief, the National Association of Public Hospitals and Health Systems ("NAPH"), the Grady Health System, the Health and Hospital Corporation of Marion County, the Memorial Health Care System, the New York City Health and Hospitals Corporation, the Public Health Trust of Miami-Dade County and Riverside County Regional Medical Center, respectfully submit this brief *amici curiae* in support of Petitioner seeking a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae consist of NAPH, a national association of safety net hospitals and health systems, and six of its members, all of which are owned or operated by local governments (*i.e.*, county or city hospital authority, hospital district or public benefit corporation). NAPH represents over 100 providers that deliver "safety net" health care services, predominantly in large metropolitan areas. The overwhelming majority of NAPH members are either governmentally owned or operated, or have significant long-standing ties to governmental entities. Thus, NAPH and its members have a significant interest in whether the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, may be applied to local governmental entities.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no person or entity other than *amici,* their members, or their counsel have made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

Public hospitals and health systems that are owned or operated by local governmental entities (hereinafter "local public hospitals") fill a critically important role in our society. These providers render a disproportionate share of inpatient and outpatient medical care in their communities to low income patients and otherwise vulnerable populations, typically persons who are Medicaid-eligible or without health insurance and many of whom suffer from chronic disease such as AIDS, asthma, tuberculosis and diabetes. In following their public mission, these providers serve as the primary "safety net" health care facilities in their communities.

To a large extent, private providers generally are unable or unwilling to guarantee access to care for all, regardless of ability to pay, in the same manner as local public hospitals. Market forces and the realities of health care economics simply do not permit such "generosity." Therefore, public hospitals fill the void left by this market failure, providing a public good – guaranteed access to care – that the free market cannot support. In illustration, NAPH members represent less than two percent of all hospitals in the United States, yet they provide almost 25 percent of all uncompensated hospital services across the nation. *See* Nat'l Ass'n of Pub. Hosp. & Health Sys., *America's Safety Net Hospitals and Health Systems, 1999* (2001) at iv [hereinafter *America's Safety Net*].

Local public hospitals also play a vital role in serving their communities at large, not just the poor and uninsured. In this capacity, they provide high-level specialty services such as emergency and trauma care, burn care, emergency psychiatric care and neonatal intensive care to their surrounding communities – rich and poor alike. These specialty services are provided as part of the public hospital's mission, despite their high cost and extremely low reimbursement rates. Local public hospitals also are an integral part of this nation's front line response to

emergencies, including acts of bioterrorism. As other health care providers do not generally have all of these capabilities, local public hospitals must fill a unique niche in our communities.

Given their public mission, local public hospitals are extremely dependent on funding from federal, state and local governments. NAPH member data indicates that over half of the services provided by these hospitals are to individuals covered by either Medicare or Medicaid. *Id.* at 29. These hospitals rely on federal, state and local governments for over 70 percent of their patient revenues. *Id.* at iv. Significantly, the largest single source of financial support for NAPH member hospitals, at 39 percent, is state and local government subsidies for indigent care. *Id.* at 6. One consequence of receiving this governmental funding is that local public hospitals may be subject to a myriad of federal, state and local laws governing submission of claims for reimbursement, leading to the question at hand, whether these public hospitals are subject to the FCA.

Amici submit that the decision below, *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7th Cir. 2002), is inconsistent with prior holdings of this Court and conflicts with decisions of sister circuits in regard to the applicability of the FCA to local governments. Litigation arising out of the current ambiguous state of the law is consuming scarce funds of local public hospitals that would otherwise be dedicated to providing health care services to low income and uninsured populations. Further, if they are found liable, the imposition of punitive damages upon local public hospitals under the FCA threatens the ability of these providers to render essential, yet underreimbursed, health care services in their communities.

Therefore, *amici* have a significant interest in establishing that local public hospitals are not subject to the FCA.

SUMMARY OF THE ARGUMENT

Cook County, Illinois[2] has petitioned for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit based on the decision in *Chandler*, 277 F.3d 969, which squarely conflicts with other circuit courts of appeal regarding whether local governments may be liable under the FCA. Cook County also is requesting review by the Court because of the critical nature of the issue to tens of thousands of local governments and the manifest incorrect nature of the decision below. *Amici* agree with the arguments advanced in the Petition and strongly urge the Court to grant the petition for writ of certiorari.

The current confusion in the law among circuit courts regarding the application of the FCA to local governments, and the resulting costs to the public, are alone sufficient reasons for review by the Court. *Amici* file this brief to emphasize the nature of one class of local government services – safety net health care services provided by local public hospitals – that are at risk as a result of the decision below. Indeed, the absence of clear precedent is causing litigation at significant cost that further hampers the ability of local public hospitals to carry out their essential public mission of providing health care in our communities.

Aside from the urgent need to resolve this split among the circuits, the Court should grant certiorari in this case because it has already recognized the importance of governmental immunity from punitive damages. Imposing punitive damages upon a local governmental entity results in either an increased tax burden or a diminution of services

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[2] The relator initially sued both Cook County and Cook County Hospital. Because Cook County Hospital was found to have no identity independent of the county, the hospital was dismissed from this action. *See Chandler*, 277 F.3d 969; *see also United States ex rel. Chandler v. Hektoen Inst.*, 35 F. Supp. 2d 1078, 1086 (N.D. Ill. 1999).

for the individuals served by this entity. In the circumstance of local public hospitals, punitive damages could cause irreparable harm in the form of significantly reduced access to care for community members, often the poor and uninsured, who routinely turn to these facilities when they are sick or injured.

The application of the FCA to local governmental entities is particularly unwarranted because liability under the FCA mandates the imposition of punitive damages, without alternative. Moreover, an FCA action may be prosecuted by a private relator on behalf of the United States even when the United States has declined to intervene. Thus, a private relator, if successful, may reap a "windfall" at the expense of the public. If unsuccessful, the relator has imposed significant litigation costs that would have been better spent on the provision of public services.

Therefore, whether the FCA is applicable to local public hospitals is a question of vital importance to our communities at large. Application of punitive damages in this and similar cases imposes a hardship upon the public that far outweighs any deterrent effect. Imposition of such a societal burden also conflicts with this Court's previous holdings that the FCA is a punitive statute and that local governmental entities are immune from liability for punitive damages.

For these reasons, *amici* respectfully request that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

ARGUMENT

Rule 10 of the Rules of this Court sets forth the considerations governing review of a petition for writ of certiorari. Certiorari is proper in this case because the Seventh Circuit's ruling has created a direct conflict among circuit courts. This conflict is the cause of significant litigation costs that impede the ability of local public

hospitals to fulfill their mission of rendering services to needy patient populations. Moreover, certiorari should be granted because the Seventh Circuit's decision, in departing from this Court's holdings, presents an issue of vital importance to this nation's local public hospitals and the patients they serve.

I. The Court Should Grant the Petition Because the Imposition of Punitive Damages Undermines Society's Interest in Meeting the Needs of Vulnerable Patient Populations and Taxpayers

This Court has clearly established that punitive damages should not be applied to local governments, *see City of Newport, et al. v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) and that the FCA is a punitive statute, *see Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 329 U.S. 765 (2000). These decisions make clear that punitive damages under the FCA extend beyond compensating the federal government for its losses, and instead seek to punish the wrongdoer. *Id.* at 786 (citation omitted). If applied to local public hospitals, punitive damages under the FCA would harm poor and uninsured individuals who rely on those facilities for their health care needs, in addition to the taxpayers and entire communities who benefit from the services of local public hospitals. Thus, certiorari should be granted to protect the public's interest in ensuring the viability of local public hospitals.

A. Punitive Damages May Not Be Applied to Local Governments

In the seminal case, *Newport*, 453 U.S. 247, this Court holds that local governments have absolute immunity from punitive damages under the Civil Rights Act, 42 U.S.C. § 1983. Although *Newport* arose out of alleged civil rights violations, its reasoning may be equally applied in the context of FCA claims. In particular, this Court's recognition and application of the historical presumption

against the imposition of punitive damages upon local governments, as well as its understanding of the public policy interest served by this immunity, leads inevitably to the conclusion that Congress intended that local governmental entities, such as public hospitals, be exempt from the FCA.

In *Newport*, this Court explores the history of judicial application of punitive damages in the mid-1800s – a time contemporaneous to the period in which the FCA was first enacted – and concludes that "the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation." *Id.* at 260. In explaining the common law tradition of protecting local governments from liability for punitive damages, this Court states:

> Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those [punitive damages] which the plaintiff has recovered … cannot, in our opinion, be sanctioned by this court, *as they are to be borne by widows, orphans, aged men and women and strangers,* who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.

Id. at 261 (quoting *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 677 (La. 1846)) (emphasis added).

In *Newport*, this Court determines that punitive damages do not compensate the injured party, but instead are intended to punish the wrongdoer and deter similar actions in the future. *Id.* at 266-67. Indeed, the cost

associated with such punitive damages "may be very real," "imposing strain on local treasuries and therefore on services available to the public at large." *Id.* at 270-71. "Neither reason nor justice" supports imposing such punishment on the innocent taxpayers of a local government, who would bear the burden of punitive damages through reduced services or higher taxes. *Id.* at 267.

This Court's reasoning in *Newport* is as applicable to the FCA as to 42 U.S.C. § 1983 because the FCA imposes punitive damages. Thus, imposing FCA damages upon local governments would contradict the Court's holding in *Newport*. Because the FCA *mandates* treble damages, it is by its construction, an inappropriate punishment of local governments, resulting in detrimental harm to the public. In contrast, when the application of punitive damages is *discretionary*, the court or fact finder may look to common law principles to weigh such factors and determine whether punitive damages are indeed appropriate. Such factors may include: 1) whether the award was excessive or inadequate, 2) the degree of reprehensibility of the defendant's conduct, 3) the financial position of the defendant, and 4) the cost of litigation. *See Pacific Mutual Life Insur. Co. v. Haslip, et al.*, 499 U.S. 1, 21 (1991). This process allows for the necessary balancing of the benefit to the plaintiff and the need for deterrence against the cost imposed upon the blameless, which in the case of local public hospitals, are the taxpayers, vulnerable patient populations and communities at large. The FCA provides no such opportunity to consider the equities of each case in awarding punitive damages. This absence of alternatives provides more reason why absent clear congressional intent, immunity should be applied to local governments under the FCA.

The Seventh Circuit's opinion below ignores the Court's application of a common law presumption against

imposing punitive damages upon local governments, as well as policy considerations that strongly support this presumption. In subjecting Cook County to potential FCA liability, the court below also disregards the cost to the taxpayers, as well as to the community served by Cook County. In illustration, the court held:

> Presumably any ill-gotten gains from the federal government produce more services or lower taxes. Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit.

Chandler, 277 F.3d at 978. The court's faulty logic undermines its own argument. Any "unjust" benefit that local taxpayers have arguably received is the amount of the claim paid to which the public entity was not entitled. The unjust benefit is thereby fully returned when the federal government is compensated for its losses, which could be achieved through alternative mechanisms. *See* 31 U.S.C. § 3930(D)(5) (2001). In contrast, the FCA's treble damages and penalties are purely punitive – they do not represent any "ill-gotten gains" from which local citizens have benefitted.

Therefore, we urge the Court to grant certiorari in order to clarify that the reasoning in *Newport* requires the application of immunity for local governments from the FCA.

B. The FCA Is Not Applicable to Local Governments Because It Is a Punitive Statute

This Court has already held that States are immune from the FCA and the FCA is a punitive statute. *See Stevens*, 329 U.S. 765. In *Stevens*, this Court holds that States are not "persons" covered under § 3729(a) of the FCA because when it was initially drafted ~~in 1~~863, it did not

define the term "person." *Id.* Given that the original purpose of the FCA was to stop "massive frauds perpetrated by large [private] corporations during the Civil War," the Court determines that the language of the FCA did "less than nothing to overcome" the presumption that States, as sovereigns, are not covered by the term "person." *Id.* at 782-784 (citations omitted).

When Congress amended the FCA in 1986 to impose treble damages and increase civil penalties for violators, Congress again declined to explicitly include state or local governments in the statute's definition of "persons." *See* False Claims Amendment Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986). Further, this Court interprets the 1986 amendment as transforming the FCA into a "punitive" statute. *See Stevens*, 329 U.S. at 784-785. Absent clear congressional intent, the imposition of FCA damages upon States would be inconsistent "in light of the presumption against imposition of punitive damages upon governmental entities." *Id.* at 785 (citing *Newport*, 453 U.S. 247).

This Court's reasoning in *Stevens* regarding the presumption against imposing punitive damages on taxpayers must logically be applied to exempt local governments from liability under the FCA. The Third and Fifth Circuits have interpreted this Court's precedent in precisely this manner. *See United States ex rel. Dunleavy v. County of Delaware*, 2002 U.S. App. LEXIS 1214 (3rd Cir. 2002)[3]; *United States ex rel. Garibaldi v. Orleans Parish*

[3] The Third Circuit explains:

> We find nothing on the face of the relevant portions of the FCA as originally enacted in 1863 or in its current form which evidences a clear indication on the part of Congress to subject local governments to punitive damages under the Act. The Act is utterly devoid of any specific intention to subject local governments to its strictures. This lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA.

Dunleavy, 2002 U.S. App. LEXIS 1214, at *13.

School, 244 F.3d 486 (5th Cir. 2001). Many district courts have agreed. *See United States ex rel. Kinney v. Hennepin County Med. Ctr.*, 2001 U.S. Dist. LEXIS 10170 (D. Minn. Jan. 22, 2001); *United States ex rel. Honeywell v. San Francisco Housing Auth., et al.*, 2001 U.S. Dist. LEXIS 9743 (N.D. Cal. Jul. 12, 2001); *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp.2d 1092 (C.D. Cal. 2001); *United States ex rel. King v. Jackson County Hosp. Corp. of Mariana, Fl.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001).[4]

In stark contrast to the many courts that have considered this issue, the Seventh Circuit disregards this Court's precedent in *Stevens* and *Newport*, to arrive at the conclusion that a local public hospital is not immune from the FCA and its punitive damages. Because this decision results in inconsistent burdens upon local taxpayers and members of the public served by local governments, this Court should grant certiorari to clarify this standard.

C. FCA Liability Would Be Particularly Detrimental to Individuals Relying On Local Public Hospitals

Interpreting the FCA's liability provisions to incorporate long-standing local governmental immunity from punitive damages is consistent with public policy, as many courts have already concluded. The public policy arguments are particularly persuasive in the context of local

[4] Other district courts have disagreed, thereby causing a split at the district court level. *See United States ex rel. Rosales v. San Francisco Hsg. Auth.*, 173 F. Supp. 2d 987 (N.D. Cal. 2001); *United States ex. rel. Giles v. Sardie*, 2000 U.S. Dist. LEXIS 21068 (C.D. Cal. Jul. 27, 2000); *United States ex rel. R&R Ltd. P'ship v. Mass. Hsg. Fin. Agency*, 154 F. Supp. 2d 19 (D.D.C. 2001).

public hospitals providing health services to underserved populations.

Harm to members of communities served by local public hospitals will be certain and widespread should those hospitals continue to face FCA litigation and punitive damages. Because public hospitals simply do not have disposable resources to pay for such additional costs, FCA. liability will inevitably result in a reduction in services. Local public hospital margins, or the ratio of their revenues to costs, are less than half of that for the industry as a whole. *See America's Safety Net* at 16. In other words, public hospital revenues from patient care services are much lower than private hospital revenues, and are not sufficient to cover high litigation costs or punitive damages awards in FCA cases. In addition, the mere potential for FCA liability and treble damages significantly increases the cost of insurance premiums or may even endanger the ability of the hospital to maintain insurance. When faced with these costs, public hospitals must either turn to local taxpayers for additional funding or free up current funds by reducing services. In either case, the burden of FCA liability will be borne by the innocent – taxpayers or patient populations.

This mission of public hospitals is to provide access to vital health care services to all regardless of ability to pay. Such guaranteed access is particularly important in this time of a nation-wide rise in the number of uninsured. *Id.* at 12. In the face of reduced reimbursement from private and government sources, private providers are less willing or able to serve the uninsured. Public hospitals therefore are assuming an increasingly greater share of this burden. *Id.* This trend is evident in the high percentage of the uninsured among patients discharged by NAPH member institutions.[5]

[5] For example, 39 percent of discharges in 1999 were of the uninsured at the Grady Health System, 47 percent at Jackson Memorial Hospital (Public Health Trust of Miami-Dade County), 32 percent at the

Public hospitals are thus an irreplaceable component of the health care system in this country because they serve those with nowhere else to turn.

Serving the poor and uninsured is not the only crucial role filled by local public hospitals in their communities. NAPH members are also often the primary providers of highly-specialized and extremely expensive services, upon which entire communities rely, such as emergency and trauma care, burn care, pediatric and neonatal intensive care, HIV/AIDS treatment, and psychiatric care. For example, NAPH members represent only 16 percent of all hospital beds, but provide 54 percent of all burn unit beds, 25 percent of all pediatric intensive care unit beds, 26 percent of all psychiatric beds, and 37 percent of all Level I trauma centers. *Id.* at 7-8. These services are not readily available at all hospitals because they are so costly to provide and because they are often severely underreimbursed. In accordance with the public hospital mission, providing such services is a "public good," which is funded in part through local taxpayer support because the market itself does not always ensure adequate access.

Local public hospitals also typically serve as the backbone of community disaster preparedness efforts, which have become particularly important in recent months due to increased concern about threats of biological, chemical or nuclear terrorism. These hospitals are often the only facilities in their community with the capacity to prepare for and respond to mass casualty attacks. *See, e.g.*, Nat'l Ass'n of Pub. Hosp. & Health Sys., *What Are the Basic Components of a Sound Hospital Emergency Preparedness Program?* (2000). Such emergency preparedness requires training, stockpiling supplies and drugs, purchasing specialized equipment and coordinating with local, state and

Health and Hospital Corporation of Marion County and 43 percent at Riverside County Regional Medical Center. *Id.* at 22-23.

national public health officials. Public hospitals also must be ready to respond to other types of public health emergencies, such as natural disasters, urban riots and airplane and train accidents. *Id.* Local communities and indeed the nation as a whole have come to rely on public hospitals to assume these critical responsibilities. Yet these entities do so with very little financial support.

Finally, local public hospitals provide other types of services to an extent not typically provided by private hospitals. These services are critical to enable vulnerable populations to access our health care system. For example, public hospitals provide intensive translation and interpretation services for patients with limited or no English proficiency. NAPH member, Hennepin County Medical Center, for example, meets the needs of its immigrant patients by employing more than 50 interpreters proficient in 20 different languages. *See* Nat'l Ass'n of Pub. Hosp. & Health Sys., *The Safety Net*, Vol. 15, n.2, 1, 26 (Spring 2002). Other such "enabling services" include child care, social services, transportation and financial counseling. There is typically no direct reimbursement for these essential services.

Given the manner in which they serve their communities, local public hospitals are operating under significant financial constraints. Uncompensated care accounts for 27 percent of total costs for NAPH hospitals as a whole, or approximately $4.7 billion in 1999. In comparison, uncompensated care has remained at six percent for the past 20 years across the entire hospital industry.[6] *America's Safety Net* at 12, 27.

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[6] This is evidenced by the levels of uncompensated care costs borne by *amici*. In 1999 the Grady Health System had total uncompensated care costs of $229 million (over 50 percent of its total costs); Jackson Memorial Health System had over $185 million (25 percent of its total costs); the New York City Health and Hospitals Corporation facilities had over $428 million, the Health and Hospital Corporation of Marion County had $88 million (36 percent of its total costs) and Riverside County Regional Medical Center had $74 million (45 percent of its total costs). *America's Safety Net*. at 26-27.

The foregoing strongly illustrates why punitive damages under the FCA should not be imposed upon local public hospitals. Where the margins of these public hospitals are so low, with minimal, if any, ability to absorb significant new costs, the imposition of punitive damages will jeopardize the health of local communities – possibly on a massive scale. Such a result contradicts this Court's policy considerations articulated in *Newport* and *Stevens,* supporting its conclusion that punitive damages should not be imposed upon municipalities.

Moreover, the imposition of FCA punitive damages is unnecessary to ensure justice. The FCA allows for the use of alternative mechanisms to ensure that local public hospitals comply with federal law. *See* 31 U.S.C. § 3930(D)(5). We therefore urge the Court to grant certiorari in order to apply its sound reasoning in *Newport* and *Stevens* to grant immunity from FCA liability to local governments so that they may continue to provide essential community services.

II. Confusion Caused by a Split in the Circuits Requires Review by this Court

The Court should also grant the petition for certiorari because the confusion caused by the split in the circuits demands review. *See* Sup. Ct. R. 10(a). Many NAPH members, including fellow *amici*, have faced FCA lawsuits. The required defense of these lawsuits is itself an expensive drain on their ability to provide services to their communities. If it is allowed to stand, the Seventh Circuit's decision will only encourage further FCA litigation against local public hospitals. The cost of this litigation, in addition to the potential application of punitive damages, will

provide for windfall recoveries to some relators, while exacerbating the precarious financial straits of safety net hospitals across this nation.

CONCLUSION

For the foregoing reasons, *amici curiae* request this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

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BRIEF OF AMICI CURIAE THE CITY OF NEW YORK, THE CITY OF BOSTON, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF CHICAGO, THE CITY OF INDIANAPOLIS, THE CITY OF MILWAUKEE, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

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No. 01-1572

IN THE
SUPREME COURT OF THE UNITED STATES

COOK COUNTY, ILLINOIS,

Petitioner,

-against-

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE THE CITY OF NEW YORK, THE CITY OF BOSTON, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF CHICAGO, THE CITY OF INDIANAPOLIS, THE CITY OF MILWAUKEE, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The City of New York, the City of Boston, the City and County of San Francisco, the City of Chicago, the City of Indianapolis, the City of Milwaukee, the International Municipal Lawyers Association, the National Association of Counties and the National League of Cities respectfully submit this brief as amici curiae supporting the petition for certiorari of Cook County, Illinois. Amici urge

this Court to grant Cook County's petition because the Seventh Circuit's decision in this case, which conflicts with other Circuits in allowing a local government to be sued under the federal False Claims Act ("FCA"), involves a vitally important issue for local governments around the country facing potentially overwhelming liability exposure under the Seventh Circuit's decision.[1] Allowing this decision to stand without review will subject local governments to the FCA's massive punitive remedies of treble damages plus penalties and will undermine this Court's long-standing presumption that local governments are immune from punitive remedies in the absence of explicit statutory authorization.

The City of New York is a political subdivision of the State of New York that annually receives billions of dollars in federal funds either directly from the United States or through the State for numerous essential municipal services and programs. In some instances, the City of New York is responsible for providing these essential services to its citizens and for implementing these programs, and in other instances, the City is responsible for determining eligibility for these programs. Generally, the federal government and the State of New York disburse the funds and monitor their expenditure.

The City of Boston is a political subdivision of the Commonwealth of Massachusetts. The City and County of San Francisco is a political subdivision of the State of California. The City of Boston and the City and County of San Francisco annually receive significant sums

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[1] The filing of this amici curiae brief is accompanied by the written consent of all parties.

Pursuant to Rule 37.6, counsel for amici are the sole authors of this brief and no one other than amici or their counsel made a monetary contribution to the preparation or submission of the brief.

of federal funds either directly from the United States or through the State for essential municipal services and programs. Subjecting the City of Boston and the City and County of San Francisco to treble damage liability under the FCA would harm local taxpayers who would be called upon to pay those damages, and would also harm the beneficiaries of essential local services, who would face the reduction or elimination of those services to pay those damages.

The City of Chicago is the largest municipality in the Seventh Circuit, which rendered the erroneous decision below. The City of Indianapolis is the largest city in Indiana and is located within the Seventh Circuit. The City of Chicago and the City of Indianapolis are very concerned that if certiorari is not granted in this case and the decision set aside, that decision will improperly subject them to treble damages and attorney's fees under the FCA.

The City of Milwaukee is a political subdivision of the State of Wisconsin. In fiscal 2001, the City of Milwaukee received approximately $50.6 million in federal dollars to either spend or administer primarily for Community Development Block Grants and for public health and law enforcement purposes.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided

services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

The National Association of Counties is an organization whose members include county governments and officials from throughout the United States. The organization has a compelling interest in legal issues that affect local governments.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. NLC serves as a national resource and advocate on behalf of over 1,800 cities and 49 state municipal leagues, whose membership totals more than 18,000 cities, towns and villages.

The False Claims Act was enacted in 1863 with "the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 781, 120 S. Ct. 1858, 1867 (2000), citing *United States v. Bornstein*, 423 U.S. 303, 309, 96 S. Ct. 523, 528 (1976). Over the years, Congress amended the FCA many times, making the most significant amendments in 1986 by, *inter alia*, increasing the statute's mandatory civil remedies from double to treble damages and from a $2,000 penalty to a $5,000-$10,000 penalty for each violation. 31 U.S.C. §3729(a); *Stevens,* 529 U.S. at 785, 120 S. Ct. at 1869. Under the statute as amended in 1986, a whistleblower, known as the "relator," may bring a *qui tam* civil action "for the person and for the United States Government." 31 U.S.C. §3730(b)(1). The relator is generally entitled to receive between 15 and 30 percent of the total recovery. 31 U.S.C. §§3730 (d)(1); (d)(2).

Prior to the 1986 amendments, it appears that the statute was not invoked against local governments, and with one exception, it appears that the statute was not invoked against states. *See United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980) (court vacated district court decision that states were not "persons," holding instead that the district court had lacked subject matter jurisdiction over the case). Subsequent to 1986, however, there have been an increasing number of cases brought against governmental entities, thereby subjecting localities to the statute's severe punitive structure and allowing private individuals to collect a windfall at taxpayers' expense.

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858 (2000), this Court examined the question of whether a State is a "person" for purposes of the FCA. In concluding that a State is not a "person" under the FCA, the Court held that the treble damages and civil penalties imposed under the FCA were "punitive in nature," *id.* at 784-85, 120 S. Ct. at 1869, and that the imposition of such punitive damages would be inconsistent with state *qui tam* liability in light of the long-standing "presumption against imposition of punitive damages on governmental entities." *Id.*, citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981). The rationale for this common law protection is that punitive sanctions punish innocent taxpayers, not actual wrongdoers, and subject governmental entities to undue fiscal constraints. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 259-64, 101 S. Ct. at 2756-58. In *City of Newport,* this Court stated the general rule that, in light of the presumption of municipal immunity, "Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 263, 101 S. Ct. at 2758, citing *Pierson v. Ray,* 386 U.S. 547, 555, 87 S. Ct. 1213, 1218 (1967).

In holding Cook County amenable to suit under the FCA, the Seventh Circuit rejected this interpretive rule, holding just the opposite: that Congress must specifically indicate its intent to exempt local governments from a statutory scheme imposing punitive remedies. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 979 (7th Cir. 2002). The Seventh Circuit's holding is in direct conflict with the Third Circuit and the Fifth Circuit, which applied the "well-settled presumption" that local governments are immune from punitive remedies, in holding that local governments are not amenable to suit under the FCA. *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002); *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002).

The Seventh Circuit's holding that local governments are subject to the punitive sanctions of the FCA has profound implications for innocent local taxpayers. As a result of the Seventh Circuit's decision to allow the assessment of punitive treble damages and penalties against local governments, funding for local government services may decrease significantly. Local government liability under the FCA will adversely affect localities' ability to serve their residents. It is local governments that actually administer many federal programs, providing services such as education, health, child welfare and environmental protection, and it is the localities' ability to provide these critical services that is jeopardized by the treble damages and up to $10,000 per claim penalty imposed by the FCA.

Amici therefore are vitally interested in the outcome of this suit. They submit that, in seeking to combat private military profiteering during the Civil War by enacting the FCA, and in subsequently amending the

statute to augment punitive remedies, Congress never intended to disrupt the administration of federal programs at the local level. But that is exactly the result of permitting FCA liability, since it allows recoveries of treble damages, penalties, and a windfall to an individual whistleblower, all at the expense of local taxpayers. Amici urge the Court to grant Cook County's petition and reverse the Seventh Circuit's determination that local governments are "persons" subject to suit under the FCA.[2]

REASONS FOR GRANTING THE PETITION

I

RESOLUTION OF THE CIRCUITS' CONFLICT OVER THE VIABILITY OF THE PRESUMPTION OF LOCAL GOVERNMENT IMMUNITY FROM PUNITIVE REMEDIES IS CRITICAL TO ASSESSING FCA LIABILITY.

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981), this Court held that municipalities were immune from punitive damages under the Civil Rights Act of 1871, 42 U.S.C. §1983. In so holding, the Court reviewed the long history of municipal immunity, and reiterated that "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Id.* at 260 n.21, 101 S. Ct. at 2756

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[2] Amici address only whether a local governmental entity is a proper *qui tam* defendant, not whether it is a proper *qui tam* relator. *See Stevens*, 529 U.S. at 787 n.18, 120 S. Ct. at 1871 n.18 (leaving open question of whether States can be "persons" for purposes of commencing FCA *qui tam* action after finding that States were not "persons" for purposes of *qui tam* liability).

n.21. The rationale for this common law immunity from punitive remedies is simple: punishment should be imposed only against actual wrongdoers and not against the taxpaying citizens of the community. *Id.* at 261-63, 101 S. Ct. at 2756-58. The presumption against punitive remedies protects "the public from unjust punishment, and the municipalities from undue fiscal constraints." *Id.* at 263, 101 S. Ct. at 2757-58. The Court recognized the serious fiscal consequences of imposing punitive remedies on local governments, stating that the "windfall" to the plaintiff is "likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* at 267, 101 S. Ct. at 2760.

In *Stevens*, this Court reiterated the presumption against the imposition of punitive remedies on governmental entities in holding that States are not "persons" subject to suit under the FCA. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. at 784-85, 120 S. Ct. at 1869-70. The Court specifically rejected the argument that *City of Newport* was inapplicable in the context of the FCA, reading *City of Newport* to mean that the Court was "concerned with imposing punitive damages on taxpayers under any circumstances." *Id.* at 785 n.15, 120 S. Ct. at 1869 n.15. Further, this Court explicitly found that the FCA remedy of treble damages plus civil penalties is, in fact, "punitive in nature." *Id.* at 784, 120 S. Ct. at 1869.

In light of *Stevens*, both the Third Circuit and the Fifth Circuit relied on the "well-settled presumption" that local governmental entities -- a county in the Third Circuit, and a school board in the Fifth Circuit -- are not subject to punitive damages. *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d at 222; *United*

States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d at 491-92. The Fifth Circuit found it unlikely that Congress had made a judgment that "denying the schoolchildren of Orleans Parish needed services, or requiring the taxpayers of Orleans Parish to pay higher taxes, is justified in light of the relatively minor benefit to the federal treasury," and declined to find the school board amenable to suit under the FCA in the absence of explicit language in the text of the statute. *Garibaldi*, 244 F.3d at 492. The Third Circuit similarly found that the "lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA." *Dunleavy*, 279 F.3d at 224.

Although this Court in *Stevens* had already applied the traditional governmental immunity analysis to the punitive remedies in the FCA, the Seventh Circuit rejected that analysis here and declined to apply such a presumption. First, the Seventh Circuit found that the FCA's punitive remedy scheme differed from the punitive remedy scheme under 42 U.S.C. §1983, since under the FCA "at least a portion of the recovery will come from the monies taken by the municipality through its false claims, whereas under §1983 both the compensatory and punitive damages come directly from the tax base." *United States ex rel. Chandler v. Cook County*, 277 F.3d at 978.

Second, contrary to the Third and Fifth Circuits, which required an explicit statement of congressional intent to *abrogate* governmental immunity in the face of a punitive statute, the Seventh Circuit required an explicit statement of congressional intent to *exempt* municipalities from the FCA's punitive remedies. *Id.* at 979. The Seventh Circuit thus reversed the presumption of municipal immunity from punitive remedies utilized by this

Court in *Stevens* in analyzing whether a State was subject to suit under the FCA.

Thus, the Circuits are split on whether the presumption of local government immunity from punitive remedies applies in the case of the FCA, and on how to overcome that presumption. The resolution of these differing interpretations is critical for the thousands of local governmental units that may be subject to enormous punitive remedies under the Circuits' disparate interpretation of the FCA.

II
RESOLUTION OF THE CIRCUITS' CONFLICT OVER CONGRESSIONAL INTENT IS CRITICAL TO ASSESSING FCA LIABILITY.

Where a statute is found to be punitive, local governments are immune from liability unless Congress clearly intended to authorize such liability. In analyzing the language and legislative history of the FCA, the Circuits have reached differing conclusions as to congressional intent.

The Seventh Circuit's conclusion that local governments are "persons" subject to FCA liability was based primarily on its belief that at the time of the FCA's enactment in 1863, municipal corporations were presumptively included in the definition of "person." *Chandler*, 277 F.3d at 974, 979, 980. The Seventh Circuit relied for this proposition on *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685-89, 98 S. Ct. 2018, 2033-35 (1978), citing it three times. *Chandler*, 277 F.3d at 974 ("The Supreme Court has noted that, by 1844, both private and municipal corporations were presumptively included within the meaning of 'person'"), 979, 980. But in *Monell*, the Court was considering the meaning of the word "person" in

42 U.S.C. §1983, originally enacted in 1871; the FCA was enacted eight years earlier, in 1863. The *Monell* Court found that it was clear by 1871 that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis," *Monell*, 436 U.S. at 687, 98 S. Ct. at 2034, and that the "Deveaux doctrine" stating otherwise had been abandoned by 1844. *Id.*, citing *Louisville R. Co. v. Letson*, 2 How. 495, 558 (1844) and *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809).

However, the Court did not find that municipal corporations were presumptively included within the meaning of "person" by 1844. Rather, the Court found that the principle of treating corporations as persons was not "automatically without discussion extended to municipal corporations" until 1869, six years *after* the FCA was enacted. *Monell*, 436 U.S. at 688, 98 S. Ct. at 2034, citing *Cowles v. Mercer County*, 7 Wall. 118, 121, 74 U.S. 118 (1869). For purposes of analyzing the meaning of "person" in the Civil Rights Act of 1871, the Court in *Monell* also looked to the 1871 Dictionary Act, passed shortly before the Civil Rights Act, which provided "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, §2, 16 Stat. 431; *Monell*, 436 U.S. at 688-89, 98 S. Ct. at 2034-35. The Dictionary Act, of course, could not have applied to an interpretation of the word "person" in the FCA, since the FCA was enacted six years earlier.

Despite this legislative history, the Seventh Circuit concluded that local governments were included in the FCA's definition of "person" in 1863, and further found that the 1986 amendments to the FCA did not change the meaning of "person" or explicitly exempt municipalities.

Chandler, 277 F.3d at 974. First, the Seventh Circuit considered 31 U.S.C. §3733, which enables the Attorney General to issue civil investigative demands to "any person" possessing "information relevant to a false claims law investigation." 31 U.S.C. §3733(a)(1). Section 3733(l)(4) defines "person" as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." This Court in *Stevens*, citing to the Dictionary Act, 1 U.S.C. §1 and relying on the presumption that States are not covered by the term "person," found that the existence of a definitional provision of "person" that explicitly included States in §3733, together with the absence of such a provision in §3729, "suggests that States are not 'persons' for purposes of *qui tam* liability under §3729." *Stevens*, 529 U.S. at 784 & n.14, 120 S. Ct. at 2748 & n.14. The Seventh Circuit, however, relying on its mistaken belief that local governments were presumptively included in the definition of "person," viewed the civil investigative demands provision, as well as several other provisions added by the 1986 amendments, as insufficient to "support an inference that Congress intended [municipalities] to be exempt." *Chandler*, 277 F.3d at 975.

Second, the Seventh Circuit relied on the congressional failure in 1986 specifically to exempt municipalities from the FCA definition of "person" as evidence of intent, because, according to the Seventh Circuit, Congress was "aware of the presumption that municipalities are included within the meaning of the term 'person.'" *Id.* at 979. However, the *Monell* presumption that municipalities are included in the meaning of the term "person" was limited to the Civil Rights Act of 1871, and there is no reason for Congress to have assumed that the definition of "person" also applied to the FCA. In addition, the Dictionary Act, which in 1871 had originally included

"bodies political and corporate" in the presumptive definition of "person," was amended in 1874 to eliminate that phrase. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 81, 109 S. Ct. 2304, 2318 (1989) (Brennan, J. dissenting)(citing T. Durant, Report to Joint Comm. on Revision of Laws 2 (1873)).

In contrast, the Third and Fifth Circuits found no authority to indicate that local governments were intended to be included as "persons" either in 1863 or in 1986. *Dunleavy*, 279 F.3d at 224; *Garibaldi*, 244 F.3d at 494. The Fifth Circuit viewed this Court's determination in *Monell* that local governments are "persons" under § 1983 "as premised on specific indications in the legislative history" of that statute that do not appear in the legislative history of the FCA. *Garibaldi*, 244 F.3d at 494. The Third Circuit found that the legislative history of the 1986 amendments "cannot pass muster in light of the *Stevens* Court's express rejection of the pertinent 1986 legislative history as erroneous and of questionable value." *Dunleavy*, 279 F.3d at 225. Both Circuits further found that not only was there an absence of evidence of congressional intent to abrogate local government immunity, but that "Congress' imposition of treble damages is powerful evidence that Congress did not intend to subject local governments to punitive damages under the FCA." *Id.* at 225; *Garibaldi*, 244 F.3d at 493 ("We are convinced that the punitive damages regime of the False Claims Act discussed above reflects a congressional intent that the term 'person in the liability provisions of the False Claims Act not include local governments").

Thus the views of the Seventh Circuit on the one hand, and the Third and Fifth Circuits on the other hand, evidence a serious disagreement as to the meaning of the language and legislative history of the FCA. The question of congressional intent to subject thousands of

local governments to liability under the FCA presents a staggering fiscal issue that should be settled by this Court, rather than allowing such liability to depend on the fortuity of geographic location.

III
ALLOWING LOCAL GOVERNMENT LIABILITY UNDER THE PUNITIVE SCHEME OF THE FCA THREATENS DISRUPTION OF SERVICES AND DIVERSION OF RESOURCES FROM FEDERAL OBJECTIVES.

Resolution of the issue presented in this case is critical to local governments. Rather than pursuing federal monies for profit, local governments apply for and utilize federal funds for the benefit of their residents. They do so in cooperation with states and the federal government, sharing both legal and financial responsibility for implementing a wide variety of government programs that are promoted by the federal government through federal funding. While the federal government and states monitor and fund many government programs, it is the unique role of local governments to implement those programs and provide direct services.

Because of the range of services provided by local governments with federal financial support, however, all of these services are targets under the FCA. In recent years, there has been a dramatic increase in the number of FCA suits against local governments, exposing those governments and their taxpayers to significant litigation costs, the risk of enormous punitive remedies and the threatened disruption of government services. Yet, it would appear to be glaringly inconsistent to find that the legislators who provided federal funds to localities to achieve various programmatic objectives would want to

expose these localities to draconian punitive remedies that might well interfere with their ability to implement those objectives. The threat that FCA liability would disrupt services and divert resources from federal objectives mandates that liability for local governments be based on an explicit congressional directive rather than on inference or presumption.

Further, localities, unlike private corporations, are partners with the states and the federal government in implementing federal programs. Exposing localities to punitive treble damages and civil penalties through FCA litigation can interfere with statutory procedures for administration of federal programs designed to ensure both compliance with federal requirements and the provision of government services. These statutory and regulatory procedures -- such as reporting requirements, monitoring, audits, reauthorizations, withholding of selected payments or cutting off funds altogether -- give federal officials ample means to ensure local government compliance with federal standards while enabling the provision of services to continue. By contrast, the sheer magnitude of FCA treble damage exposure for local governments, given the width and breadth of federal funding programs, will undermine the cooperative mechanisms established by Congress to ensure the delivery of services in accordance with federal objectives.

CONCLUSION

The petition of Cook County, Illinois for a writ of certiorari should be granted.

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No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether local governmental entities are subject to *qui tam* actions under the False Claims Act. 31 U.S.C. § 3729.

LIST OF PARTIES

The parties to the proceeding below were the petitioner/defendant, the County of Cook, the petitioner's co-defendant, the Hektoen Institute For Medical Research, and the respondent/plaintiff, Janet Chandler, a relator under the False Claims Act. The United States declined to intervene in this case but participated in the issues raised in this petition as an *amicus curiae* before the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

No. 01-1572

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-26a, is reported at 277 F.3d 969 (7th Cir. 2002). The opinions of the district court, Pet. App. 27a-29a; Pet. App. 30a-49a, are reported at 118 F. Supp. 2d 902 (N.D. Ill. 2000) and 35 F. Supp. 2d 1078 (N.D. Ill. 1999).

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2002. The petition for a writ of certiorari was filed on April 19, 2002. The Court granted the petition on June 28, 2002. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

As presently codified, the pertinent liability provision of the False Claims Act, 31 U.S.C. § 3729, provides as follows:

§ 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

31 U.S.C. § 3729(a) (2000). The full text of the current version of the False Claims Act, 31 U.S.C. §§ 3729-3733, and the full text of its original version, "An Act to prevent and punish Frauds upon the Government of the United States," Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, are set forth in an appendix to this brief. *See* Appendix A, 1a-31a; Appendix B, 32a-37a.

STATEMENT OF THE CASE

1. The False Claims Act ("FCA") imposes liability on "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a) (2000). The person found in violation of the FCA is subject to "a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." *Id.* An FCA action can be brought by the Attorney General or by a private individual, a *qui tam* relator, on behalf of the United States. *Id.* § 3730. If brought by a relator, the complaint is filed under seal, and the United States has an opportunity to intervene and proceed with the action. *Id.* § 3730(b)(2). If the United States opts to intervene in the case and either settles the case or prevails at trial, the relator receives between 15% and 25% of the proceeds. *Id.* § 3730(d)(1). However, if the United States declines to intervene, the relator "who initiated the action shall have the

right to conduct the action." *Id.* § 3730(b)(4)(B). If successful, the relator receives between 25% and 30% of the proceeds together with reasonable expenses, attorneys' fees and costs. *Id.* § 3730(d)(2).

The FCA does not define a "person" subject to liability; however, the term "person" has remained in the statute "unchanged" since the original enactment in 1863. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). The original enactment of the FCA, known as "An Act to prevent and punish Frauds upon the Government of the United States," authorized private individuals to bring an action on behalf of the United States; a successful relator was entitled to collect one half of the double damages and fines. Act of Mar. 2, 1863, ch. 67, §§ 4, 6, 12 Stat. 696, 698. For years, the FCA remained virtually the same.[1] However, in 1986, Congress enacted the most significant changes of the FCA's 123-year history. Included in the 1986 amendments to the FCA was the increase in the civil remedy from mandatory double to mandatory treble damages and an increase in fines from $2,000 to between $5,000 and $10,000 for each violation. 31 U.S.C. § 3729(a).[2]

2. In 1989, the National Institute of Drug Abuse ("NIDA") called for proposals for a treatment program for and a

[1] In 1943, Congress amended the FCA by, *inter alia*, decreasing the relator's bounty to a "fair and reasonable compensation" if the United States intervened or to a maximum of 25% if the United States did not intervene. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. In 1982, Congress replaced "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States" with "[a] person not a member of an armed force of the United States." 31 U.S.C. § 3729 (1982); *see also Stevens*, 529 U.S. at 782.

[2] Pursuant to the Federal Civil Penalties Inflation Act of 1990, 28 U.S.C. § 2461, the FCA's penalties were increased in 1999 to range between $5,500 and $11,000 per false claim. *See* 85 C.F.R. § 85.3(a)(9).

research study of substance-abusing pregnant women. Pet. App. 31a. Cook County Hospital ("CCH"),[3] a Cook County-owned and operated hospital, submitted a grant proposal to conduct a treatment program and research study over a five-year period. Pet. App. 31a, 32a. NIDA awarded a $5 million grant to CCH. Pet. App. 32a. After CCH developed the treatment and study protocol, NIDA transferred the administration of the grant from CCH to the Hektoen Institute for Medical Research ("Hektoen"). *Id.* Hektoen hired Relator Janet Chandler, Ph.D. ("Relator"), a psychologist, as the project director on September 1, 1993 and fired her on January 24, 1995. Pet. App. 32a, 33a.

3. On January 24, 1997, Relator filed this FCA action against Cook County, Illinois ("Cook County"), CCH,[4] and Hektoen, alleging that they failed to comply with the terms and conditions of the grant by reporting "ghost" research subjects, failing to obtain informed consent forms from patients, failing to randomize patients, and submitting false progress reports. Pet. App. 32a. Relator also alleges that defendants, in contravention of the protocol, administered improper doses of methadone to patients, improperly engaged in early detoxification of patients, and otherwise provided substandard medical care to patients. *Id.* Relator contends that her discharge was retaliatory. Pet. App. 30a.

Relator does not claim that the grant money was used for any purpose other than to treat patients and conduct a research study. Nor does she claim that any person or entity used grant money for personal gain. Relator seeks treble the amount of the grant, that is to say, $15 million, plus fines of

[3] The Cook County Board of Commissioners changed the name of Cook County Hospital to the "John H. Stroger, Jr. Hospital of Cook County" effective December 18, 2001.

[4] CCH was dismissed from this lawsuit as having no identity independent of Cook County. Pet. App. 47a.

up to $10,000 each for an unspecified number of alleged false claims, together with costs, expenses, and attorneys' fees.

4. The United States declined to intervene in this case.[5] In February 1998, Relator amended her complaint and served it on the defendants. All defendants moved to dismiss. During the briefing of the motions to dismiss, the United States District Court for the Southern District of New York issued a decision holding that the FCA "does not authorize suits against municipal entities." *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998). In light of that decision, Cook County was granted leave to supplement its motion to dismiss.

On February 8, 1999, the district court denied Cook County's motion to dismiss, holding that municipal entities are "persons" under the FCA. Pet. App. 46a. The district court also found that the mandatory treble damages scheme of the FCA is not punitive, and, thus, that Cook County is not immune from suit. Pet. App. 30a. Cook County appealed the district court's denial of its immunity claim under the collateral order doctrine. In an unpublished order, on May 18, 1999, the court of appeals dismissed the appeal on the ground that "[t]here is no arguable immunity issue and no basis for appellate jurisdiction over Cook County's appeal." Pet. App. 50a. Cook County petitioned for a writ of certiorari, which the Court denied on October 12, 1999. Pet. App. 51a.

On May 22, 2000, the Court held that States are not subject to suit under the FCA. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000). Among other things, the Court found that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of

[5] Because the United States declined to intervene, only *qui tam* liability is at issue in this case.

punitive damages on governmental entities." *Id.* at 784-85 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63 (1981)).

Following the Court's decision in *Stevens*, Cook County moved the district court to reconsider the denial of its earlier motion to dismiss. On reconsideration, the district court found no reason to depart from its earlier conclusion that Cook County is a "person" under the FCA. However, the district court held that Cook County was immune from liability because of the FCA's punitive damages, and, therefore, should be dismissed. In reaching that conclusion, the district court relied on the Court's decision in *Stevens* and on the Eastern District of Pennsylvania's subsequent decision in *United States ex rel. Dunleavy v. County of Delaware*, 2000 WL 1522854, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa. Oct. 12, 2000), *aff'd*, 279 F.3d 219 (3d Cir. 2002). Pet. App. 28a, 29a.

5. On January 22, 2002, the court of appeals reversed the district court's dismissal of Cook County, holding that local governments were presumed to be "persons" subject to liability when the FCA was originally enacted in 1863. Pet. App. 8a. The court of appeals also held that local governments are not immune from the FCA's punitive damages regime because Congress did not specifically exempt them. Pet. App. 17a-18a. The court of appeals stayed the issuance of mandate pending the Court's disposition of this case. *United States ex rel. Chandler v. Cook County, Illinois*, 282 F.3d 448 (7th Cir. 2002).

SUMMARY OF THE ARGUMENT

1. The False Claims Act ("FCA") subjects to liability "any person" who submits a false claim to the United States. However, the FCA does not define "person." In *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, the Court observed that the term "person" was included in the

original enactment of 1863 ("1863 Act") and has remained in the statute "unchanged" since that time. 529 U.S. 765, 783 n.12 (2000). The plain language of the 1863 Act shows that Congress did not subject local governments to liability. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. Notably, the 1863 Act expressly refers to the military status of the "person" and subjects the "person" to criminal penalties, *id.*, both of which are incompatible with local governmental liability.

The court of appeals' decision in this case turned on its erroneous conclusion that local governments were presumed "persons" as far back as 1844. Pet. App. 8a. That conclusion was based on a misreading of *Monell v. Department of Soc. Serv. of City of New York*, 436 U.S. 658 (1978). What *Monell* stated is that *private* corporations were held to be persons in 1844 but that it was not until 1869 that "the [same] principle was automatically and without discussion extended to municipal corporations." *Id.* at 687-88. In other words, local governments were not presumed to be "persons" for purposes of suit in federal court until six years after the FCA was originally enacted in 1863. The court of appeals erroneously read into the 1863 Act a presumption that did not exist at that time.

The legislative history and overall purpose of the 1863 Act further confirms that local governments were not Congress' target. Significantly, the 1863 Act was enacted as a result of widespread fraud against the federal government in the sale of provisions and munitions during the Civil War. *United States v. McNinch*, 356 U.S. 595, 599 (1958). As the Court has repeatedly noted, Congress originally enacted the FCA "with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Stevens*, 529 U.S. at 781 (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)); *see also McNinch*, 356 U.S. at 599; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943).

Instead of studying the text and legislative history of the 1863 Act, the court of appeals sought to ascertain the meaning of the word "person" in the 1863 Act by looking to a Senate Judiciary Committee Report issued 123 years later. Pet. App. 10a-11a. That report, as the Court has previously determined, is based on a mistaken interpretation of the original enactment and case law. *See Stevens*, 529 U.S. at 783 n.12. Congress did not subject local governments to liability under the 1863 Act. Inasmuch as the term "person" has remained in the statute "unchanged" since 1863, *see Stevens*, 529 U.S. at 783 n.12, local governments have never been subjected to FCA liability. The court of appeals erred in holding otherwise. Moreover, the court of appeals' summary conclusion that local governments were presumptively included in the term "person" in the 1863 Act infected its analysis of the 1986 amendments to the FCA.

2. In 1986, Congress imposed mandatory treble damages and increased the fines for violations of the FCA. The Court in *Stevens* characterized the FCA's treble damages scheme as "essentially punitive." *Stevens*, 529 U.S. at 784. There is a presumption that local governments enjoy a common-law immunity from punitive damages that is rebutted only if Congress expressly abrogates the immunity. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63 (1981). Nowhere in the text of the 1986 amendments is there an explicit expression that Congress abrogated the governmental immunity from punitive damages. Nor does the legislative history of the 1986 amendments contain an expression of Congressional intent to impose punitive damages on local governments. Therefore, even if local governments were "persons" subject to suit under the 1863 Act, in 1986, when Congress increased the damages to a punitive level, local governments became absolutely immune from FCA suits because Congress did not expressly abrogate the common-law governmental immunity from punitive damages.

Unlike the FCA's liability provision, both the civil investigative demands provision of the FCA and the Program Fraud Civil Remedies Act, a sister statute of the FCA, expressly define "person." 31 U.S.C. § 3733; 31 U.S.C. § 3801. These provisions further demonstrate a Congressional intent to exclude local governments from the FCA's punitive liability.

The court of appeals employed an incorrect standard to reach its conclusion that Congress intended local governments to be subject to punitive damages under the FCA. Instead of looking for express evidence that Congress abrogated the common-law immunity, as required by *City of Newport*, the court of appeals erroneously held that, in the absence of an express *exemption*, local governments were subject to the FCA's punitive damages.

Strong policy reasons support Congress' determination not to subject local governments to FCA liability. The burden of the FCA's punitive damages would be borne by the taxpayers of local governments, resulting in either reduced services or increased taxes. Moreover, *qui tam* actions undermine the cooperative relationship between the United States and local governments in which the United States provides funding to local governments which, in turn, administer a panoply of programs and services for the benefit of their residents. At the same time, the United States has sufficient remedies other than the FCA to recover for fraudulent claims submitted by local governments. Pet. App. 17a.

The Court should reverse the judgment of the court of appeals.

ARGUMENT

Congress did not subject local governments to FCA suits when it passed the 1863 Act. Nor did Congress choose to do so when it enacted the 1986 amendments. Congress' original intent was both clear and perfectly understood. Tellingly, in

the period from 1863 to 1986, there is not a single reported case in which a local government was sued under the FCA. It was not until the 1986 amendments, when the damages were trebled and the fines substantially increased, that local governments suddenly became targets for enterprising relators. However, a "person" subject to liability under the FCA has never included local governments. Moreover, even if local governments were "persons" under the 1863 Act, in 1986, when Congress increased the damages to a punitive level without expressly abrogating the common-law governmental immunity from punitive damages, Congress effectively excluded local governments from the FCA's reach.

I. A LOCAL GOVERNMENT IS NOT A "PERSON" SUBJECT TO SUIT UNDER THE ORIGINAL 1863 ENACTMENT OF THE FALSE CLAIMS ACT.

A. The Plain Language Of The 1863 Act Establishes That Local Governments Are Not Subject To FCA Suits.

The term "person" is not defined in 31 U.S.C. § 3729 (2000). The Court recently observed, however, that the term "person" has remained in the statute "unchanged" since the FCA was originally enacted in 1863. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). Therefore, any analysis of the term "person" must begin with the 1863 Act.

The meaning of statutory language, "plain or not," depends on context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Since before the Civil War, the Court has "stressed that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (quoting *United*

States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)).[6] An examination of the context in which the term "person" was used in the 1863 Act firmly supports the conclusion that local governments could not be reached under the statute.

1. At least two features of the plain language of the 1863 Act indicate that Congress did not direct it at local governments. First, the 1863 Act was aimed at "any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war," and "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States." Act of Mar. 2, 1863, ch. 67, §§ 1, 3, 12 Stat. 696, 696, 698. Congress' use of military status to qualify the term "person" constitutes strong indicia that the term "person" in the 1863 Act did not include local governments.

Second, the 1863 Act made fraud upon the government a criminal offense: persons in the military were subject to court-martial (but expressly exempt from punishment of death), while persons not in the military were subject to punishment by "imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars." *Id.* §§ 1, 3, 12 Stat. at 697, 698. The criminal penalties for a person not in the military were in addition to the $2,000 forfeiture per false claim and double damages. *Id.* § 3, 12 Stat. at 698. The 1863 Act also provided that "[a]ny such person [violating the act] may be arrested and held to bail in such sum as the district judge may order, not exceeding the said sum of two thousand dollars, and twice the amount of the damages sworn

[6] Likewise, under the Dictionary Act, which was enacted eight years after the 1863 Act, the definition of the term "person" is qualified by the context of its use. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (current version at 1 U.S.C. § 1 (2000)).

to in the affidavit of the person bringing the suit." *Id.* § 5, 12 Stat. at 698. Finally, the 1863 Act made any person in the military who has committed a violation, but who is subsequently discharged or dismissed from service, still subject to court-martial "in the same manner and to the same extent as if he had not received such discharge or been dismissed." *Id.* § 2, 12 Stat. at 696-97.

As the Court observed in *Stevens*, since the 1863 Act applied only to "any person not in the military" and "imposed criminal penalties that included imprisonment," it was far from clear that States were subject to the 1863 Act. 529 U.S. at 782; *see also United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 878 (D.C. Cir. 1999) (criminal penalty inconsistent with State liability under FCA). The criminal penalties and military reference are likewise inherently inconsistent with local governmental liability. Nothing in the text of the 1863 Act remotely suggests that "person" included local governments. The court of appeals' conclusion that the term person included local governments cannot be squared with the text of the 1863 Act.

2. Instead of reading the term "person" within the context of the 1863 Act, the court of appeals, citing *Monell v. Department of Soc. Serv. of City of New York*, 436 U.S. 658 (1978), read into the plain language a "presumption" that municipal corporations were included within the meaning of "person" in 1863. Pet. App. 8a. Both *Monell* and the cases cited therein disprove the court of appeals' interpretation and confirm that local governments were *not* "presumptively" persons subject to suit in federal court in 1863.

Monell considered whether municipal corporations were persons when the Civil Rights Act, 42 U.S.C. § 1983 ("Section 1983"), was enacted in 1871. *Monell*, 436 U.S. at 665-89. The Court noted that Congress was concerned about takings of private property by local governments. *Id.* at 687 ("Given this purpose, it beggars reason to suppose that

Congress would have exempted municipalities from suit."). The Court also noted that an Act of Congress ("Dictionary Act"), enacted only months before Section 1983 was enacted, provided that: "'In all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.'" *Id.* at 688 (quoting Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431). *Monell* concluded that municipal corporations were included within the term "person" when Section 1983 was enacted in 1871. *Id.* at 688-89.

Contrary to the court of appeals' interpretation, *Monell* did not find that "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person.'" Pet. App. 8a. Rather, the Court observed in *Monell*:

> [O]nly two years before the debates on the Civil Rights Act, in *Cowles v. Mercer County*, 7 Wall. 118, 121 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress.

Id. at 688 (citation omitted). Thus, *Monell* points out that municipal corporations were routinely sued in federal court *after* the *Cowles* decision in 1869.

A closer look at the Court's nineteenth century cases cited in *Monell* shows that, while, in 1844, it was established that *private* corporations doing business were generally considered persons for the purpose of lawsuits in federal court, that same understanding had *not* been expanded to *public* or municipal corporations by 1863. *Id.* In 1809, in *Bank of the United States v. Deveaux*, the Court considered whether a private corporation had a legal identity apart from its "corporators" for purposes of jurisdiction. 9 U.S. (5 Cranch)

61 (1809). The Court held that the act of incorporation conferred no right on the plaintiff bank to sue in federal courts. *Id.* at 86. "[T]he corporate name represents persons who are members of the corporation." *Id.* at 91. The Court concluded that its jurisdiction depended on "the character of the individuals who compose the corporation." *Id.* at 91-92.

The Court revisited this decision in 1844, when it abandoned the reasoning in *Deveaux*. *Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). In *Letson*, the Court noted:

> A suit then brought by a citizen of one state against a corporation by its corporate name in the state of its locality, by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction is concerned, between citizens of the state where the suit is brought and a citizen of another state. The corporators as individuals are not defendants in the suit, but they are parties having an interest in the result, and some of them being citizens of the state where the suit is brought, jurisdiction attaches over the corporation—nor can we see how it can be defeated by some of the members, who cannot be sued, residing in a different state.

Id. at 554. The Court concluded that "a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial one, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person." *Id.* at 558. Thus, the *Letson* holding applied only to private business corporations, not public or municipal ones.

As the Court noted in *Monell*, it was not until 1869 that the Court extended *Letson* to public corporations. *Monell*, 436 U.S. at 688 (citing *Cowles v. Mercer County*, 74 U.S.

(7 Wall.) 118 (1869)). The opinion in *Cowles v. Mercer County* begins:

> The record presents but one question which has not been heretofore fully considered and repeatedly adjudicated. That question is, whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois.

74 U.S. (7 Wall.) 118, 121 (1869). *Cowles* noted that, prior to 1844, "it was held necessary to aver the requisite citizenship of [a corporation's] corporators" and that *Letson* changed the existing law with respect to private business corporations. *Id. Cowles* expanded on *Letson*: "In the case before us the corporators are all citizens of Illinois, and the corporation is liable to suit within the narrowest construction of the Constitution." *Id.* at 121-22. The Court held, in 1869, that the board of supervisors, being "a corporation created by acts of the legislature of Illinois" and "authorized to contract for the county," could be sued in federal court. *Id.* at 122. However, inasmuch as the 1863 Act was enacted six years before the *Cowles* decision, the holding in *Cowles* does not support the court of appeals' position that local governments were presumptively considered persons in 1863.[7]

The court of appeals erred in applying to the plain language of the 1863 Act a presumption that did not exist in 1863. The absence of that presumption together with the exclusion of local governments from the plain language of the 1863 Act conclusively establish that the term "person" in the FCA does not include local governments.

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[7] The Dictionary Act does not compel otherwise. The 1863 Act was enacted eight years before the Dictionary Act defined "person" to include "bodies politic and corporate" unless the context in which it is used indicates otherwise. Act of Feb. 25, 1871, § 2, 16 Stat. 431. However, the Dictionary Act, by its own terms, applied only to subsequent acts of Congress. *Id.* ("in all acts hereafter passed"). Thus, the Dictionary Act has no application to the 1863 Act.

B. The Legislative History Of The 1863 Act Confirms That Congress Did Not Intend For Local Governments To Be Subject To FCA Suits.

1. The legislative history clearly establishes that local governments are not subject to liability. As it worked its way through Congress, the bill which became the FCA was narrowed substantially. As originally introduced, Senate Bill 467 broadly would have made liable "any person" submitting a false claim. S. 467, 37th Cong., 3d Sess. § 1 (Jan. 15, 1863). The bill subsequently was referred to the Committee on Military Affairs and the Militia and extensively rewritten. Among other things, the revised bill replaced the phrase "any person" with the phrases "any person in the land or naval forces" and "any person not in the military." S. 467, 37th Cong., 3d Sess. §§ 1, 4 (Jan. 29, 1863). In so doing, Congress clearly expressed its intention not to reach all types of "fraudsters." *See Stevens*, 529 U.S. at 781 n.10 (FCA was intended to cover all types of fraud, but not all types of "fraudsters").

Further evidence that Congress did not intend to subject local governments to liability under the 1863 Act can be seen in its consideration and ultimate rejection of a provision allowing for court-martial and punishment without presentment or indictment by a grand jury of any person *not in the military* "who shall contract to furnish" military supplies to the United States fraudulently. S. 467, 37th Cong., 3d Sess. § 2 (Jan. 29, 1863). Following a vigorous debate,[8] these controversial provisions were withdrawn from

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[8] Senator Howard, the author of Senate Bill 467 and chair of the Senate Committee on Military Affairs, argued that a person who contracts with the United States to supply arms is no different from the officer and soldier who bears the arms and, therefore, should be treated as a member of the military subject to court-martial. Cong. Globe, 37th Cong., 3d Sess.

Senate Bill 467, Cong. Globe. 37th Cong., 3d Sess. at 957-58 (1863), and were not enacted.

Placed in its historical context, the 1863 Act was adopted as a response to the "plundering of the public treasury" in the "purchasing of necessities of war." *McNinch*, 356 U.S. at 599. Quoting a book on the Civil War, one court remarked:

> The War Department found itself at the hands of unscrupulous and corrupt government contractors. The abuses and damage done to the federal treasury and war effort was, for defense contractors, an opportunity for windfall profit. The contractors were fast becoming "proverbially and notoriously rich."

United States ex. rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) (citing 1 F. Shannon, *The Organization and Administration of the Union Army, 1861-1865*, at 54-55 (1965)). As indicated in a contemporary periodical, "[f]or sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *Id.* (quoting Tomes, *Fortunes of War*, 29 Harper's Monthly Mag., 228 (1864)). Thus, the principal goal of the 1863 Act was "'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Stevens*, 529 U.S. at 781 (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976), but adding "[private]").[9] No court, to date, has identified any case of a

953 (1863). Senators Cowan and Davis thought the idea a "monstrous proposition" and "stupendous absurdity." *Id.* at 956-57.

[9] It would have been quite anomalous for Congress, at the height of the Civil War, to subject cities and other local governments in the Union to liability under the 1863 Act. Indeed, as populous centers, the cities in the North were expected to respond in the largest numbers to the President's call for volunteer soldiers. *See* Proclamation No. 24, 13 Stat. 750

local government having sold military goods to the United States during the Civil War, let alone defrauding the United States in the sale of military goods. *See United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 494 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808 (2002) (observing that neither relator nor the United States supplied any authority to show that the FCA's framers contemplated liability for local governments).

Unlike the legislative history of Section 1983, which indicates that Congress intended to include local governments as defendants, the FCA's legislative history contains no such indications. *Id.* This is not surprising because the number of federally-funded services provided by local governments are largely the result of legislation passed in the latter half of the twentieth century. Therefore, it is unlikely that Congress, in 1863, ever envisioned local governments as recipients of federal funding or federal contracts. There is simply no evidence in the legislative history to suggest that Congress contemplated applying the 1863 Act to local governments. The 1863 Act's plain language, viewed together with its legislative history, supports the conclusion that the term "person" did not include local governments. *See Stevens*, 529 U.S. at 781-82 (noting that the 1863 Act applies to private contractors and corporations).

(Dec. 19, 1864) (calling for 300,000 volunteers); *see also* Act of Feb. 24, 1864, ch. 13, § 2, 13 Stat. 6 (requiring local governments to meet quota based on the "number of men resident" therein); Act of July 4, 1864, ch. 237, §§ 1, 8, 13 Stat. 379, 380 (crediting volunteers to the quota of local governments). On the other hand, the fraudulent activities of private defense contractors, left unchecked, would have set the North's war efforts back at a critical time. *See* Cong. Globe, 37th Cong., 3d Sess, 953 (1863) (statement of Senator Howard: "[I]t is entirely clear that without the employment of contractors for the purpose of procuring [supplies], the Army itself would be totally worthless and useless.").

2. In concluding that local governments were "persons" subject to suit under the 1863 Act, the court of appeals in this case found persuasive a 1986 Senate Committee Report, S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273, which states that the term "person" in the FCA includes "States and political subdivisions thereof." Pet. App. 10a. The assertion contained in the Senate Committee Report purports to be based on case law, but as the Court has noted, the Senate Committee's understanding of the meaning of "person" in the FCA was "erroneous." *Stevens*, 529 U.S. at 783 n.12. The court of appeals in this case side-stepped the Court's finding by limiting the Court's remark to "States." Pet. App. 11a at n.8. *Stevens*, however, made no such distinction. Indeed, the 1986 Senate Committee Report is based on a mistaken interpretation of the 1863 Act and case law and is, therefore, likewise erroneous with respect to local governments.

The Senate Committee Report's Background Statement, "History of the False Claims Act and Court Interpretations," to which the court of appeals cites, claims to describe "person" under the FCA:

> The False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broad sense to include . . . States and political subdivisions thereof. *Cf. Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 315 U.S. 792 (1942); *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

S. Rep. No. 99-345, at 8-9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273-74. The cases to which the Senate Committee Report cites, none of which involve the FCA, highlight the Senate Committee's fundamental misunderstanding of the history of the FCA.[10] *See United States ex rel. Dunleavy v.*

[10] In *Ohio v. Helvering*, the Court held that a State did not enjoy immunity from the federal liquor tax where it "engages in a business of a private nature" as opposed to when it engages in a governmental function. 292 U.S. at 368. In *Georgia v. Evans*, the Court held that States are "persons" with standing to bring suits under the Sherman Act. 315 U.S. at 162-63. In *Monell*, the Court found that municipalities were considered "persons" amenable to suit in 1871 for purposes of Section 1983 claims. 436 U.S. at 688-89. None of the cases cited in the Senate Committee Report stand for the proposition that "person" in the FCA includes local governments.

County of Delaware, 279 F.3d 219, 226 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002) *petition for cert. filed*, No. 01-1711 (May 20, 2002); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 353 (S.D.N.Y. 1998).

Moreover, the Senate Committee Report is no more than "a legislative observation about what § 3729(a), enacted by an earlier Congress, means." *Long*, 173 F.3d at 878. As the Court has continually observed, "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *West v. Wright*, 505 U.S. 277, 295 n.9 (1992) (citations omitted); *see also Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) ("*post*-enactment history of a statute's consideration and enactment—is a contradiction of terms") (emphasis in original). The court of appeals erred in relying on inaccurate post-enactment history.

Because the undefined term "person" has remained in the statute unchanged since 1863 and because "person" subject to suit did not, in 1863, include local governments, local governments are not subject to liability under the FCA.

II. THE 1986 AMENDMENTS TO THE FCA MADE LOCAL GOVERNMENTS IMMUNE FROM LIABILITY.

Even if local governments were "persons" subject to suit under the 1863 Act, in 1986, when Congress imposed mandatory treble damages—which *Stevens* found to be punitive—local governments became absolutely immune from an FCA

suit. While Congress has the power to impose punitive damages on local governments, it must do so expressly. In enacting the 1986 amendments, Congress did not expressly abrogate the governmental common-law immunity from punitive damages, effectively immunizing local governments from FCA suits.[11]

Prior to *Stevens*, the law was unsettled as to whether the FCA's damages under the 1986 amendments were punitive. *Stevens* resolved this question: "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 784-85 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63 (1981)). The Court contrasted the FCA's current damages regime with the pre-1986 regime, noting that the earlier version, which imposed double damages and a $2,000 penalty per false claim, was remedial rather than punitive. *Id.* at 785 (citing *United States v. Bornstein*, 423 U.S. 303, 315 (1976)). In *Stevens*, the Court observed: "'The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the

[11] "[T]here is a significant conceptual overlap—though admittedly not an identity—between the abrogation inquiry and the statutory construction question" whether Congress intended to include local governments as defendants upon which mandatory treble damages could be assessed. *See Long*, 173 F.3d at 889; *see also Dunleavy*, 279 F.3d at 223 ("whether the term 'person' as used in the [FCA] encompasses local governments . . . is simply the other side of the coin with respect to the question . . . whether Congress clearly abrogated local governmental immunity under the FCA"). Congress' imposition of punitive damages in 1986 also stands as a confirmation that the term "person" does not include local governments. *Cf. Stevens*, 529 U.S. at 784-87 (punitive damages feature of FCA further supporting Court's conclusion that "person" does not include States).

liability of wrongdoers.'" *Id.* at 786 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)).

The three circuits that have considered whether the FCA's mandatory treble damages regime can be imposed on local governments have all followed *Stevens* for the proposition that the FCA's damages under the 1986 amendments are punitive. *See Dunleavy*, 279 F.3d at 223; *Garibaldi*, 244 F.3d at 491; Pet. App. 13a. However, two circuits held that the FCA's punitive damages constitute a bar to suits against local governments, *Dunleavy*, 279 F.3d at 226 ("local governments are exempt from FCA damages"); *Garibaldi*, 244 F.3d at 495 ("The punitive damages regime of the False Claims Act shows a congressional intent that the False Claims Act should not be applied to local governments."), whereas the court of appeals in this case found that the interpretative presumption against the imposition of punitive damages on local governments had been overcome. Pet. App. 18a.

The court of appeals, having initially determined that a presumption existed in 1863 that local governments were "persons," concluded that the 1986 amendments indicate "continued liability" of local governments under the FCA because Congress did not expressly exclude local governments from the FCA's punitive damages. Pet. App. 9a. In arriving at that conclusion, the court of appeals ignored the well-established requirement that, if Congress intends to impose punitive damages on local governments, it must expressly indicate its intent. The court of appeals employed an incorrect standard by looking for an express exemption of local governments as opposed to an express abrogation of local governmental immunity from punitive damages. Neither the 1986 amendments nor the legislative history surrounding the enactment of those amendments support the

court of appeals' conclusion that Congress intended local governments to be subject to the FCA's punitive damages.[12]

A. Local Governments Are Absolutely Immune From FCA Suits Because Congress Did Not Abrogate The Common-Law Governmental Immunity From Punitive Damages.

1. There is a well-settled presumption that local governments are not subject to punitive damages. *Stevens*, 529 U.S. at 785. In *City of Newport v. Fact Concerts, Inc.*, the Court noted that certain common-law immunities were well-established as affirmative defenses and confirmed that the immunity against punitive damages on governmental entities "was not open to serious question." 453 U.S. 247, 258-59 (1981).

The Court has, "on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637 (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)); *see also City of Newport*, 453 U.S. at 263; *Graber*, 8 F. Supp. 2d at 351 ("If *City of Newport* means anything at all, it means that it is up to Congress to clearly signal its desire to subject municipalities to exemplary damages, regardless of the plaintiff."). "The general rule today is that no punitive

[12] There is no indication that a local government had ever been sued under the FCA prior to the 1986 amendments. The only reported FCA case prior to 1986 that was brought against *any* governmental entity was *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370 (5th Cir. 1980), a suit against a State. The court of appeals never reached the question of whether Florida was a proper defendant under the FCA because the judgment was vacated for lack of subject matter jurisdiction, the action being premised on information already in the hands of the United States. *Id.* at 1371.

damages are allowed [against a governmental entity] unless expressly authorized by statute." *City of Newport*, 453 U.S. at 261 n.21.

Significantly, the local governmental immunity from punitive damages is an *absolute* immunity. *See City of Newport*, 453 U.S. at 271. "[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Where a complaint seeks both compensatory and punitive damages under its legal theory, such as a Section 1983 claim, a local government can claim immunity from liability from the punitive damages portion of the relief sought. Where, on the other hand, a suit is brought under a statute that *mandates* treble damages and a district court has no discretion to reduce the damage award, as in the FCA, the governmental immunity from punitive damages necessarily becomes an immunity from suit. *See, e.g., Dunleavy*, 244 F.3d at 225; *Graber*, 8 F. Supp. 2d at 356 (dismissing city from FCA case); *compare Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3d Cir. 1991) (RICO suit cannot be maintained against a municipal corporation because its mandatory treble damages are punitive); *Massey v. City of Oklahoma*, 643 F. Supp. 81, 86 (W.D. Ok. 1986) (same).[13]

City of Newport was decided five years before Congress amended the FCA in 1986. Thus, Congress, in 1986, was aware of the local governmental immunity against the imposition of punitive damages when it increased the FCA's

[13] The FCA contains an exception to the imposition of mandatory treble damages, providing that double damages can be assessed in those cases in which defendants provide information regarding a violation to the United States before they have knowledge that an investigation into the violation is under way. 31 U.S.C. § 3729(a). However, unless a local government acts under this exception, the mandatory punitive damages scheme necessarily applies. *See Stevens*, 529 U.S. at 785 n.16.

damages. Moreover, Congress understood the damages to be punitive. Indeed, Congress, in amending the FCA, was pursuing the dual goals of punishment and deterrence. *See* 132 Cong. Rec. 22,336-37 (1986) (statement of Rep. Fish). Congress also made the punitive damages scheme mandatory. 31 U.S.C. § 3729(a). Finally, Congress understood that it could not abrogate the common-law immunity unless it affirmatively manifested its intention to do so.

The text of the 1986 amendments contains no expression of any intent by Congress that the FCA's punitive damages be imposed on local governments. While Congress contemporaneously defined certain key terms in the liability provision, such as "claim" and "knowing," 31 U.S.C. § 3729(b)-(c), it did not define "person" to include local governments, the clearest means of expressly abrogating the governmental immunity. If anything, in 1986, Congress was concerned with fraud on local governments and protection of local taxpayers when it conferred federal jurisdiction over State law claims arising from the same occurrence as an action brought under Section 3730 "for recovery of funds paid by a State or local government." 31 U.S.C. § 3732 (2000).

Congress knows how to signal clearly its intention to subject a local government to liability. Congress has defined "person" to include units of local government in other statutes covering a broad range of substantive law. *See Dunleavy*, 279 F.3d at 224; *Graber*, 8 F. Supp. 2d at 351 n.8 (collecting statutes); *see also* 15 U.S.C. § 3002(1) (2000); 16 U.S.C. § 1532(13) (2000); 42 U.S.C. § 2000e(a) (2000); 42 U.S.C. § 2014e(s) (2000); 42 U.S.C. § 7602(e) (2000); 42 U.S.C. § 9601(21) (2000); 42 U.S.C. § 6903(15) (2000); 16 U.S.C. § 4903(4) (2000); 33 U.S.C. § 1362(5) (2000); 42 U.S.C. § 300f(12) (2000); 33 U.S.C. § 2701(27) (2000); 42 U.S.C § 11049(7) (2000); 43 U.S.C. § 1331(d) (2000). In fact, as if emphasizing that the Dictionary Act, 1 U.S.C. § 1, does not include local governments in its definition of "person" in

other statutes, Congress has specified when governmental entities are to be considered persons *in addition to* the entities included in the definitions in the Dictionary Act. *See, e.g.*, 30 U.S.C.A. § 1511(d) (2002) ("As used in this subchapter, the term 'person' includes municipalities, . . . as well as the entities included within such term under section 1 of Title 1."); 49 U.S.C.A. § 40102(a)(33) (2002) (person includes, "in addition to its meaning under section 1 of title 1," a municipality); *see also* 49 U.S.C. § 60101(a)(17) (2000); 31 U.S.C. § 5312(a)(4) (2000); 49 U.S.C. § 5102(9)(A) (2000).[14]

The FCA "offers no clear indication that Congress intended to abrogate local governmental immunity from punitive damages." *Dunleavy*, 279 F.3d at 224. For that reason, the *Garibaldi* court refused to find that Congress intended to subject municipal entities to liability under the FCA. *Garibaldi*, 244 F.3d at 492 ("Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the FCA."). For that same reason, the *Dunleavy* court found: "At best, after considering the text of the statute and its legislative history, we find only ambiguity as to whether Congress intended to disturb the well-settled doctrine of local governmental immunity from punitive damages under the FCA. Ambiguity, however, is not enough . . . to carry the day." *Dunleavy*, 279 F.3d at 225.

In contrast, the court of appeals, turning *City of Newport* on its head, looked for an express *exemption* of municipal entities from the FCA's punitive damages and, finding none,

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[14] In the current version of the Dictionary Act, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2000). The Dictionary Act separately defines a "county" to include "a parish, or any other equivalent subdivision of a State or Territory of the United States." *Id.* § 2.

flatly held that the presumption had been overcome. Pet. App. 16a ("Congress made no adjustment to the general scheme for municipal entities."). In so doing, the court of appeals ignored the Court's consistent refusal "to construe the general language of [a statute] as automatically abolishing such traditional immunities by implication." *See City of Newport*, 453 U.S. at 258. The court of appeals erred in invoking an unprecedented standard—one that is contrary to the Court's requirement of an explicit expression from Congress. *See id.* at 261 n.21.[15]

The absence of an explicit abrogation of immunity in the liability provision of the FCA is a clear indication that Congress did not intend to impose punitive damages on local governments. As *Dunleavy* put it: "Congress' imposition of treble damages is powerful evidence that Congress did not intend to subject local governments to punitive damages under the FCA." *Dunleavy*, 279 F.3d at 225.

2. Other provisions of the FCA enacted in 1986 confirm that Congress did not intend for local governments to be subject to liability for punitive damages. The Civil Investigative Demands ("CID") provision, which authorizes the Attorney General to issue civil investigative demands to persons with information relevant to a false claims investigation, defines "person:" "*for purposes of this section*, . . . the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision." 31 U.S.C. § 3733(l) (2000) (emphasis added). The CID provision creates "a pre-lawsuit

[15] One federal district court recently "performed an exhaustive search and yet was unable to find any court of appeals decisions, with the exception of the Seventh Circuit's recent decision in *Chandler*, authorizing an award of punitive damages against a municipality, absent express statutory authority to do so." *Schultzen v. Woodbury Cent. Cmty. Sch. Dist.*, No. C01-4089-MWB, 2002 U.S. Dist. LEXIS 3010, at *86 (N.D. Iowa Feb. 22, 2002).

discovery mechanism which allows the Department of Justice to conduct discovery in civil false claims cases, without the expense of first filing a civil fraud case in Federal district court." 132 Cong. Rec. 22,336 (1986) (statement of Rep. Glickman). The FCA's CID provision was modeled on the Hart-Scott-Rodino Antitrust Improvements Act of 1976, S. Rep. No. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5266, 5298, which provided the Antitrust Division with expanded opportunities for pre-complaint discovery against "non-target" third parties. H.R. Rep. No. 94-1343, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2596, 2597. Similarly, the FCA's CID provision allows "persons," including non-target local governments, as well as States, to be served with pre-complaint discovery, even though States and local governments are not subject to liability under the FCA. As the Court observed in *Stevens*, States may have important evidence with respect to the United States' investigation of false claims by private parties. *See Stevens*, 529 U.S. at 784 n.13. The same is true of local governments.

Yet, according to the court of appeals: "Although [the CID] definition does not demonstrate Congressional intent to impose liability on municipalities, it certainly does not support an inference that Congress intended them to be exempt." Pet. App. 10a. The court of appeals' analysis is not consonant with *Stevens*, which concluded that "[t]he presence of such a definitional provision in § 3733 [CID provision], together with the absence of such a provision from the definitional provisions contained in § 3729 [liability provision], *see* §§ 3729(b)-(c), suggests that States are not 'persons' for purposes of *qui tam* liability under § 3729." *Stevens*, 529 U.S. at 784. This same analysis suggesting that States are not "persons" under the FCA holds true for local governments. The CID's definition of "person" to include political subdivisions of States, coupled with the undefined term "person" in the liability provisions, supports a

conclusion that Congress did not expressly abrogate the governmental immunity from punitive damages in the FCA.

Another change to the FCA in 1986 considered by the court of appeals was the whistleblower provision. 31 U.S.C. § 3730(h). The whistleblower provision was enacted in response to testimony that Congress heard from employees of the defense industry, not of local governments. *See* S. Rep. No. 99-345, at 2, 14, *reprinted in* 1986 U.S.C.C.A.N. at 5270, 5279. The whistleblower provision uses the word "employers" without defining the term, *id.*, though the 1986 Senate Committee Report states that the term "employer" includes "public as well as private sector entities." Pet. App. 11a (citing S. Rep. 99-345 at 34-35, *reprinted in* 1986 U.S.C.C.A.N. at 5299-5300). Based on that phrase in the Senate Committee Report, the court of appeals concluded there would be no reason to subject local governments to whistleblower liability if they were not already subject to FCA liability. Pet. App. 11a. However, the whistleblower provision protects an employee by preventing a chilling effect on disclosure of illegal practices even if the employer is not proven to have violated the FCA. S. Rep. 99-345, at 35, *reprinted in* 1986 U.S.C.C.A.N. at 5300. Therefore, it does not follow that Congress, by subjecting a governmental entity to liability for retaliation, necessarily intended to make that entity liable under Section 3729, knowing that the United States could pursue a remedy by way of a separate cause of action such as breach of contract or fraud, or by way of the administrative process.

More important, the practical effect of the court of appeals' interpretation of the whistleblower provision would be abrogation of immunity not only by implication, but by an implication drawn from an unrelated provision. The imposition of punitive damages on local governments through the whistleblower provision is not the explicit abrogation of a common-law immunity required by *City of Newport*.

Contrary to the court of appeals' conclusion, neither the CID nor the whistleblower provisions of the FCA communicate a congressional intent to impose punitive damages on local governments.

3. The legislative history of the 1986 amendments further supports a clear reading of the current FCA as excluding local governments from liability. As in 1863, the focus in 1986 was on the defense industry and the fraudulent conduct of private contractors. Senator Grassley, the sponsor of the False Claims Reform Act, S. 1562, which was later enacted, as amended, as the False Claims Act Amendments Act of 1986, S. Rep. No. 99-345 at 13, *reprinted in* 1986 U.S.C.C.A.N. at 5278, explained that the FCA is "even more crucial today as the Government spends hundreds of billions of dollars on contracts with *private corporations* in areas such as defense, aerospace, and construction." 131 Cong. Rec. 22,322 (1985) (emphasis added).[16] There was no discussion regarding fraud by local governments. *See Graber*, 8 F. Supp. 2d at 354 ("[T]here is no indication that fraud by . . . municipalities, as opposed to fraud by individuals and corporations, played any role in Congress's consideration of the 1986 amendments.").

Instead, Congress saw the taxpayers as the ultimate beneficiaries of the amendments. Senator Grassley explained that the bill "arose from a realization that the government needs help—lots of help—to adequately protect taxpayer

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[16] Representative Brooks stated that the amendments "are urgently needed in light of the recent indications of massive procurement abuses occurring in the recent military buildup." 132 Cong. Rec. 22,336 (1986). Representative Berman commented about "anonymous calls from potential whistleblowers in defense plants who were aware of illegal practices." 132 Cong. Rec. 22,339 (1986). Senator Grassley's discussion of "corporations" as the target of the amendments, 132 Cong. Rec. 28,581 (1986), indicates that the 99th Congress was focusing on private corporations.

funds from growing and increasingly sophisticated fraud." 132 Cong. Rec. 28,580 (1986). Representative Glickman noted that the bill "deals with the issue of civil and criminal penalties for those who try to take advantage of taxpayers in this country by filing false claims against the Government." 132 Cong. Rec. 22,335 (1986). While Congress' goal was to protect taxpayer funds from fraud, it expressed no intention to permit recovery from some of the same taxpayers, *i.e.*, those unfortunate individuals who pay taxes to a local government found liable under the FCA. It makes no sense to have local taxpayers compensate themselves as federal taxpayers for fraudulent acts of the local governments they fund. In sum, there is no indication in the legislative history of the 1986 amendments that Congress contemplated, much less intended, to impose the FCA's punitive damages on local governments.

4. Additional evidence that local governments are not subject to the FCA's punitive damages is found in a sister statute enacted at the same time as the 1986 amendments and "designed to operate in tandem with the FCA." *See Stevens*, 529 U.S. at 786 n.17. The Program Fraud Civil Remedies Act ("PFCRA") provides an administrative remedy for the United States to pursue false claims of $150,000 or less. 31 U.S.C. § 3801. The PFCRA prohibits the same conduct as the FCA and provides for penalties of $5,000 per false claim and double damages. *Id.* § 3802. Unlike the FCA, the PFCRA defines "person" subject to liability as "any individual, partnership, corporation, association, or private organization." *Id.* § 3801(a)(6). The same section later employs the phrase "political subdivision of a state" in defining the term "statement," *id.* § 3801(a)(9), signifying that the 99th Congress was well aware of the language it needed to employ in order to bring local governments within the purview of a statute.

In *Stevens*, the Court observed that it would be "most peculiar to subject States to treble damages and civil penalties in *qui tam* actions under the FCA, but exempt them from the relatively smaller damages provided under the PFCRA." *Stevens*, 529 U.S. at 786. The same is true for local governments. It would, indeed, be peculiar for the same Congress to have allowed suits for punitive damages against local governments under the FCA but not allow suits under the PFCRA, which provides for only double damages based on smaller initial amounts. Because Congress did not explicitly abrogate the common-law governmental immunity from punitive damages, which are mandatory under the FCA, local governments are immune from FCA suits altogether.

B. Congress' Determination Not To Impose Punitive Damages On Local Governments Is Consistent With Strong Public Policy Considerations.

As the Court has recognized, strong public policy considerations against penalizing local governments with punitive damages require an explicit expression of Congressional intent to abrogate the local governmental immunity. *See City of Newport*, 453 U.S. at 261-63. The relationship between the United States and units of local government is necessarily one of co-dependence and cooperation. The federal government provides funding for services that a local government, in turn, provides directly to its residents. In fact, it is that cooperative relationship of passing funds to a local government for the administration of direct services that makes local governments "deep pocket" targets for FCA relators. FCA suits against local governments interfere with procedures for funding and grant administration designed to ensure both compliance with federal requirements and the provision of government services.

Qui tam relators, "motivated primarily by prospects of monetary reward rather than the public good . . . are thus less

likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).[17] Consequently, the interests of the United States and a relator vis-à-vis local governments may not be compatible. In fact, *qui tam* relators can undermine the cooperative relationship enjoyed by the federal and local governments by the threat of disruption of services or by punitive damage awards. FCA suits leave local governments with equally unpalatable choices of rejecting federal funds or, if sued, either being coerced into settlement by the threat of punitive damages or incurring the cost of litigation and risking a substantial adverse judgment, which, of course, would be shouldered by the local taxpayers.

The error in the court of appeals' judgment is further demonstrated by the policy justifications offered for its view that Congress imposed punitive damages on local governments. First, the court of appeals distinguished *City of Newport* on the grounds that "there are important differences between [the punitive damages] available under sec. 1983 and those imposed by the FCA." Pet. App. 15a. The court of appeals reasoned that the imposition of punitive damages on local governments under the FCA would not be "unjust" because, unlike Section 1983 of the Civil Rights Act, where "both the compensatory and punitive damages come directly from the tax base," a portion of the recovery under the FCA comes from monies taken by the municipality through its false claims. *Id.* The Court in *Stevens* did not recognize such a distinction between Section 1983 and the FCA but noted instead that both statutes were "designed to benefit

[17] Senator Howard, the sponsor of the 1863 Act, explained that the *qui tam* provision was based "upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue.'" Cong. Globe, 37th Cong., 3d Sess. 952, 956 (1863).

the citizens of the United States." *Stevens*, 529 U.S. at 785 n.15. Whatever differences may exist between the damages scheme in the FCA and in Section 1983, they do not support a departure from the Court's well-established principle that, unless Congress expressly abrogates the presumption, local governments are immune from punitive damages.

The court of appeals also erred in assuming that the local taxpayers derive a benefit from fraudulent conduct of a local government in that "[p]resumably any ill-gotten gains from the federal government produce more services or lower taxes." Pet. App. 15a. First, Relator's own complaint suggests that federal monies were used in a manner that did not produce the intended benefit to the tax-paying public or, for that matter, any benefit at all. Pet. App. 32a. Moreover, paying *three times* the amount of any "ill-gotten gain" plus hefty fines is punitive and will necessarily come from the local tax base, taking its toll in the way of reduced services or increased taxes, not vice versa. Punitive damages, by definition, are meant to punish. *See City of Newport*, 453 U.S. at 261. "Though a local government can properly be made to pay compensation for the wrongful acts of its agents, punishing a local government is pointless." *Garibaldi*, 244 F.3d at 491.

The court of appeals' reasoning deviates from this Court's expressed concern with the hardship caused by imposing punitive damages on local taxpayers. *See Stevens*, 529 U.S. at 785 n.15. ("A better reading of *Newport* is that we were concerned with imposing punitive damages on tax-payers *under any circumstances*.") (emphasis added). Neither the local taxpayers nor the recipients of the federally-funded services play any role in the conduct giving rise to a local government's liability, yet these are the very persons who would suffer the punishment. As *Dunleavy* noted:

> [T]he rationale for exempting a municipal entity from punitive damages awards is firmly grounded in public

> policy because "assessing punitive damages against a public entity serves neither the retributive nor the deterrent purposes of . . . civil punishment and contravenes public policy by punishing the taxpayers and citizens who constitute the very persons who 'are to benefit from the public example which the granting of such damages is supposed to make of the wrongdoer.'"

Dunleavy, 279 F.3d at 222 (quoting *Genty*, 937 F.2d at 910) (citation omitted). *Garibaldi*, which had before it a school district defendant, explained:

> Imposing punitive damages on a local government in favor of the federal government is especially problematic. Requiring such a transfer payment would reflect a judgment by Congress that denying the school children of Orleans Parish needed services, or requiring the taxpayers of Orleans Parish to pay higher taxes, is justified in light of the relatively minor benefit to the federal treasury. Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the False Claims Act.

Garibaldi, 244 F.3d at 492. Nowhere in the text of the FCA or in its legislative history has Congress indicated such an intent.

Moreover, here, if successful, Relator's bounty at the expense of Cook County taxpayers would be virtually the same as the amount of the federal grant. Relator, on behalf of the United States, seeks to recover $15 million, treble the amount of the $5 million grant, plus $10,000 each for an unspecified number of false claims. Because the United States has not intervened, if successful, Relator's share of the recovery could reach $4.5 million (30% of $15 million), not including the additional 30% of the fines. All in all,

Relator could receive, at the cost of Cook County's taxpayers, an amount that essentially equals the alleged harm to the United States.[18]

There are many kinds of local governmental entities, each created to serve the public in one fashion or another. Local governments provide, among other things, schools, roads, transportation systems, infrastructure, public health systems, law enforcement, correctional systems and agricultural services. FCA suits, by their very nature, would draw money from such services and the intended beneficiaries of such services. While Congress certainly has the power to impose punitive damages on local governments, Congress did not give an explicit indication of such an intent in the FCA. Therefore, local governments are absolutely immune from FCA suits.

C. The United States Has Avenues Other Than The FCA To Recover For Fraud By Local Governments.

An absolute governmental immunity against the FCA's mandatory imposition of punitive damages does not create an all or nothing proposition for the United States. Importantly, if the United States believes that it has been defrauded by a local government, it has remedies other than the FCA, such as administrative proceedings, proceedings to suspend or debar a local government that is eligible to enter into contracts with the federal government, or actions in fraud, unjust enrichment and breach of contract. *See, e.g.*, 42 C.F.R. § 52.8; 45 C.F.R. §§ 74.13, 74.48, 74.62; 45 C.F.R. §§ 92.43, 92.52. In fact, the FCA expressly permits the United States to pursue alternative remedies for fraud claims. 31 U.S.C.

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[18] This is a prime example of why an FCA suit can be so financially devastating for local governments, at times pushing them into high settlements, the burden of which falls on the local taxpayers.

§ 3730(d)(5). While alternative remedies would not provide the United States with a windfall and would not provide a *qui tam* relator with a bounty, the United States can still be made whole.

Congress was well aware of the options available to the United States when it increased the FCA's damages to a punitive level but did not abrogate the common-law governmental immunity. Congress' silence together with the serious policy considerations that militate against the imposition of the FCA's punitive damages on local governments confirm that local governments are absolutely immune from FCA suits.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

FULL TEXT OF THE FALSE CLAIMS ACT, 31 U.S.C. §§ 3927-3933 (2000)

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or

decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3729 (2000).

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall

not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money

penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO THE QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus

reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant

prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730 (2000).

§ 3731. False claims procedure

(a) A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3731 (2000).

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A sum-

mons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

§ 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy

Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the

person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by

appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS. Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative

demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall

be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it

and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.—(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the

oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation

pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was

obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any

such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law inves-

tigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

31 U.S.C. § 3733 (2000).

APPENDIX B

FULL TEXT OF ACT OF MARCH 2, 1863,
12 STAT. 696 (1863)

Chap. LXVII.—An Act to prevent and punish Frauds upon the Government of the United States.

Be it enacted by the Senate and house of Representatives of the United States of America in Congress assembled, That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry; any person in said forces or service who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement, or certificate, voucher or entry, for the purpose of obtaining, or of aiding to obtain, any approval or payment of any claim against the United States or any department or officer thereof; any person in said forces or service who, for the purpose of obtaining or enabling any other person to obtain from the Government of the United States, or any department or officer thereof, any payment or allowance, or the approval or signature of any person in the military, naval, or civil service of the United States, of or to any false, fraudulent, or fictitious claim, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any signature

upon any bill, receipt, voucher, account, claim, roll, statement, affidavit, or deposition; and any person in said forces or service who shall utter or use the same as true or genuine, knowing the same to have been forged or counterfeited; any person in said forces or service who shall enter into any agreement, combination, or conspiracy to cheat or defraud the Government of the United States, or any department or officer thereof, by obtaining, or aiding and assisting to obtain, the payment or allowance of any false or fraudulent claim; any person in said forces or service who shall steal, embezzle, or knowingly and willfully misappropriate or apply to his own use or benefit, or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States; any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service having charge, possession, custody, or control of any money or other public property, used or to be used in the military or naval service of the United States, who shall, with intent to defraud the United States, or willfully to conceal such money or other property, deliver or cause to be delivered to any other person having authority to receive the same any amount of such money or other public property less than that for which he shall receive a certificate or receipt; any person in said forces or service who is or shall be authorized to make or deliver any certificate, voucher, or receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other public property so used or to be used, who shall make or deliver the same to any person without having full knowledge of the truth of the facts stated therein, and with intent to cheat, defraud, or injure the United States; any person in said forces or service who shall knowingly purchase or receive, in pledge for any obligation or indebtedness, from any soldier, officer, or other person called into or employed in said forces or

service, any arms, equipments, ammunition, clothes, or military stores, or other public property, such soldier, officer, or other person not having the lawful right to pledge or sell the same, shall be deemed guilty of a criminal offense, and shall be subject to the rules and regulations made for the government of the military and naval forces of the United States, and of the militia when called into and employed in the actual service of the United States in time of war, and to the provisions of this act. And every person so offending may be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death.

Sec. 2. *And be it further enacted*, That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

Sec. 3. *And be it further enacted*, That any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, he shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more

than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars.

Sec. 4. *And be it further enacted*, That the several district courts of the United States, the circuit court of the District of Columbia, or any court therein to be established having general jurisdiction in civil cases, the several district courts of the Territories of the United States within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 5. *And be it further enacted*, That it shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of this act by persons liable to such suit, and found within their respective districts or territories, and to cause him or her to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the said sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

Sec. 6. *And be it further enacted*, That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half of the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid

over to the United States; and such person shall be entitled to receive to his own use all costs the court may away against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Sec. 7. *And be it further enacted*, That every such suit shall be commenced within six years from the doing or committing the act, and not afterwards.

Sec. 8 *And be it further enacted*, That no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such *such* officer agent, or member, or person, so interested, who shall so act, shall, upon conviction thereof, be punished by a fine of not more than two thousand dollars nor less than five hundred dollars, and by imprisonment for a term not exceeding two years.

Sec. 9 *And be it further enacted*, That all acts and parts of acts inconsistent with or repugnant to any of the provisions of this act are hereby repealed, saving, however, and excepting any and all suits or prosecutions now commenced pending, and all rights of suit or prosecution under any prior act of Congress, on account of the doing or committing of any act hereby prohibited; and all rights and claims which the United States, or any person or persons, now have, growing out of such prior act; all which pending suits and prosecutions shall proceed and be determined, and all which rights and claims shall remain and be as valid and effectual as if this present act had not been passed; nor shall this act be so construed as in

any way to impair or affect the obligation, duty, or liability of any person who now is or shall hereafter become the surety of any person contracting with the United States, or any officer or agent thereof; but every such surety shall be liable and answerable for the default of his principal in the same manner as if this act had not been passed, save to the extent to which his principal has performed the contract, or, if damages have been so recovered, to the extent of one half of the damages so recovered and paid; which last amount may be shown in reduction of damages in any suit brought against the principal and surety, or principals and sureties, on their contract.

APPROVED, March 2, 1863.

Supreme Court U.S.
FILED
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No. 01-1572

In The

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This lawsuit alleges false claims made by petitioner Cook County, Illinois to the federal government in order to receive federal grant money. Between 1989 and 1995, the federal government paid petitioner more than $5,000,000.00 on the representations that petitioner had enrolled at least 300 drug-addicted women in an experimental program, that it had randomly assigned half of them to a comprehensive treatment program at Cook County Hospital ("CCH"), that the women and their children would receive "cadillac" treatment there, and that CCH was following protocols regarding such issues as the protection of human research subjects and the use of methadone. The respondent alleges that these representations were false. Many of the claimed enrollees were "ghosts" – people who were not in fact enrolled in the program. Few of the women who did enroll and who were assigned to CCH for treatment actually received the treatment promised. The programs for the children were substandard. Petitioner was not following the protocols it had promised to follow. Petitioner subsequently persuaded the federal government to extend the program grant by representing that dozens of pregnant women would otherwise go without services – yet there were at most seven pregnant women in the program.

Respondent Dr. Janet Chandler, the project director and later the co-principal investigator, blew the whistle on petitioner's false claims. She sued under the False Claims Act (hereafter "FCA"), 31 U.S.C. §§3729-3733 (2000), to recover, on behalf of the United States, money paid in reliance on petitioner's false representations for work that was not performed.

Cook County moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6), arguing (1) that the 1863 Congress that passed the FCA did not intend it to apply to municipal corporations; or (2) if it did, then Congress intended to

rescind that coverage *sub silentio* through an amendatory act in 1986 that increased FCA damages from double to treble. The district court accepted the latter argument, but the Court of Appeals reversed, and this Court has granted *certiorari* to resolve a split in the circuits on whether the FCA applies to municipal corporations.

1. The facts of this case.

The amended complaint (R. 14), whose allegations must be accepted as true on this appeal, alleges the following facts.

In March, 1989, the National Institute of Drug Abuse (NIDA) awarded a $5 million grant to CCH and its affiliate, The Hektoen Institute ("Hektoen"). The grant funded a five-year study of at least 300 drug-abusing pregnant women randomly assigned either to a comprehensive "one-stop" medical and social service program to be provided by CCH or to substance-abuse and medical services otherwise available within the community. Amended complaint, R. 14, ¶¶1-3. Petitioner conducted the research and provided the services for the grant, directly or indirectly received all of the grant funds, and participated in the false claims at issue from beginning to end.

By August, 1993, petitioner had fallen far short of its recruitment and retention commitments. NIDA placed it on probation, and gave it until December, 1993 to demonstrate significant improvement in enrollment or lose its funding. *Id.* ¶67. Although financial administration of the grant was transferred to Hektoen, Dr. Ellen Mason, an employee of CCH, became the principal investigator, and the research continued to be performed at CCH. *Id.* ¶¶69-72.

In December, 1993, petitioner reported that 205 research subjects were enrolled, a substantial increase from the 120 research subjects it had reported in May. In fact, however, at least 45 of these subjects were "ghosts"

(*i.e.*, persons not enrolled in the program). *Id.* ¶68. Petitioner failed to disclose the "ghosts" to NIDA or to adjust the enrollment figure. *Id.* ¶70. As a result of defendants' false claim to have made significant progress, NIDA lifted the probation and continued paying the grant money. Seven months later, defendants sought and received additional funding by making the false claim that 87 births were expected from patients who could no longer be part of the study if the grant was not extended. *Id.* ¶72. In fact, only seven research subjects were pregnant. *Id.*

As part of the grant, petitioner promised that it would follow a series of protocols relating to the use of human research subjects, guaranteeing that participants would give informed consent for both treatment and research, requiring thorough medical and drug histories and proper physical examinations, requiring the maintenance of accurate research and medical records, and governing the use of methadone. *Id.* ¶¶31, 58. Petitioner in fact knowingly failed to adhere to these protocols despite its assurances to the federal government that it would comply. *Id.* ¶¶33-39, 47, 49-64.

In January, 1995, Dr. Chandler met with the assistant to the director of CCH to voice her concerns regarding the false data and other problems. *Id.* ¶92. Three weeks later, she was fired. *Id.* ¶97.

2. The False Claims Act and its 1986 Amendments.

The FCA imposes liability on "[a]ny person who . . . knowingly presents or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. §3729(a). The term "person" has appeared unchanged in the FCA since its original enactment. *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 783, n.12 (2000). The FCA does not define "person."

Under the original FCA, violators were subject to double damages, as well as civil and criminal penalties.

The FCA has been amended several times. In 1943, Congress (a) created an absolute bar to jurisdiction over *qui tam* suits if the government had prior knowledge of the false claim; and (b) reduced the relator's share from 50 percent to 25 percent. Act of 1943, ch. 377, 57 Stat. 608. These amendments achieved their intended result of "largely eliminating the *qui tam* suit." James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* 47 (3d ed., 2002).

In 1986, spurred by a desire to modernize and revitalize the FCA, Congress again amended the Act. Those amendments created a new investigative tool for the Justice Department, the Civil Investigative Demand, §3733; enacted a new anti-retaliation provision designed to protect whistleblowers and increased the percentage of recovery whistleblowers can receive, §3730(d) and (h); increased damages from double to treble and increased the civil penalties imposed under the Act, §3729(a); and clarified that proof of fraud is not necessary, only proof that the defendant knew or had reason to know its claim was false, 3729(b). All these changes were designed to increase the scope and effectiveness of the FCA. Senate Report No. 99-345 (hereafter "S.Rep. 99-345"), at 2-3, reprinted in 1986 U.S. Code Cong. & Adm. News 5266.

3. Decisions of the courts below.

Petitioner moved to dismiss this lawsuit pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that municipal corporations are not subject to liability under the FCA. The district court initially rejected that argument. *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 35 F.Supp.2d 178 (N.D.Ill. 1999). On May 26, 2000, this Court decided *Stevens*, holding that States are not a "person" subject to liability under the FCA. Petitioner then sought reconsideration of its earlier motion,

and the district court then dismissed petitioner from the case. The district court reaffirmed its earlier holding that municipal governments were included in the term "person" under the FCA, but held that under *Stevens*, the amended treble damage provision is "essentially punitive in nature," and "the county is immune from the imposition of punitive damages, which are mandatory if liability is found under the FCA." *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 118 F.Supp.2d 902, 903 (N.D.Ill. 2000).

The court of appeals for the Seventh Circuit reversed. *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 277 F.3d 969 (7th Cir. 2000). It held that a local government is a "person" for purposes of the FCA and that they are subject to treble damages in *qui tam* lawsuits.

The court of appeals first concluded that Congress intended the term "person" to include local governmental units when it enacted the FCA in 1863. The court found that, by the time of the FCA's enactment in 1863, both "private and municipal corporations [unlike States] were presumptively included within the meaning of 'person,'" and therefore local governments (unlike States) were intended to be a "person" under the original FCA. 277 F.3d at 974. The court found nothing in the text or structure of the FCA to suggest "an exception for suits against municipalities." *Id.*

Next, the court of appeals found nothing in the 1986 Amendments to suggest that Congress intended to eliminate the FCA's preexisting coverage of local governments or to change the established meaning of the term "person." *Id.* To the contrary, the court noted that every change made in 1986 was intended to make the FCA more effective. The court identified three aspects of the 1986 amendments that "point[] to a finding of continued municipal liability." *Id.* First, the new Civil Investigative Demand (CID) provision, §3733, defines "person" to

include States and local subdivisions of States. *Id.* at 975. Thus, Congress intended municipalities to be targets of investigations, and given the presumption in 1863 that "person" includes municipalities, nothing in the CID provision "support[s] an inference that Congress intended them to be exempt" from suits. *Id.* at 975. Second, the legislative history shows that Congress intended to subject public employers to the new whistleblower-liability provision. Since under *Stevens*, States are exempt from liability under the FCA, Congress would have had no reason to protect public sector employees if municipalities were not potentially liable as a general matter under the FCA. *Id.* Third, other changes made in 1986 to strengthen the FCA militated against implying an intent by Congress to exclude, *sub silentio*, municipalities from the FCA's preexisting coverage. *Id.* at 976.

The court of appeals then considered whether Congress "made it sufficiently clear that municipalities do not enjoy the traditional common-law immunity of municipalities" from the type of "essentially punitive" treble damages provided by the 1986 Amendments to the FCA. *Id.* at 977. The court of appeals analyzed this issue under *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981), which held that Congress, in passing the Civil Rights Act of 1871 (42 U.S.C. §1983), had not intended punitive damages to be recoverable against municipal governments. The court of appeals found that the considerations which led this Court in *Newport* to find common-law punitive damages unavailable under §1983 dictated the opposite conclusion as to the FCA's treble damages.

The court of appeals first concluded that applying the treble-damage provision to municipal corporations was compatible with the purpose of the FCA. The court found "important differences between [damages] available under §1983 and those imposed by the FCA." *Id.* at 978. Unlike §1983, the FCA does not borrow a common-law conception of damages, but includes a carefully-crafted damage scheme that "provides a clear and consistent remedy for

all violations of the FCA." *Id.* The court of appeals observed that the FCA's remedy is not divided into compensatory and punitive damages, but instead calls for a trebling of actual loss which, while "punitive in nature . . . is nevertheless a response specifically determined by Congress as necessary for the effective operation of the FCA." *Id.*

Second, the court of appeals concluded that the FCA's carefully-crafted remedy mitigates the risks discussed in *Newport*. *Id.* at 978. Specifically, that remedy avoids the "broad discretion accorded juries in assessing the amount of punitive damages" under §1983, and has a specific upper limit that is directly related to the federal government's loss. *Id.* at 978. In contrast to §1983, where all of the damages come from the municipality's tax base, under the FCA "a portion of the recovery will come from the monies taken by the municipality through its false claims and the local taxpayers have already received, without justification, some of the benefit." *Id.*

The court of appeals concluded that "hold[ing] counties immune from the FCA's damages . . . would frustrate the clear intention of Congress," *id.* at 978, and it rejected the contention that in effecting the increase [in damages], Congress intended to exempt municipalities from the FCA *sub silentio*." *Id.* at 979.

SUMMARY OF THE ARGUMENT

1. Congress intended in 1863 to include municipal corporations within the term "person" in the FCA.

a. The term "person" has remained unchanged in the FCA since its passage, and therefore has the same meaning today it had in 1863. As this Court held in *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978), by 1869, when this Court decided *Cowles v. Mercer County*, 74 U.S. 118 (1869), the term "person" presumptively included municipal corporations. It did so in 1863 as well. Petitioner's assertion that the common-law understanding

of "person" drastically changed within a mere six years is highly implausible, and no evidence supports it. Instead, abundant historical evidence, including case law and contemporary treatises, shows that well before 1863, the term "person" presumptively included municipal corporations.

b. As petitioner concedes, Congress in 1863 intended the term "person" in the FCA to include private corporations. Congress intended that term to include municipal corporations as well. It is implausible that a term that included one kind of corporation by implication excluded another kind, and no evidence supports such an implied exclusion. Instead, federal and state case law and contemporary treatises show that by 1863, American law presumptively equated municipal corporations with private corporations in their susceptibility to suit.

c. Congress had no intention in 1863 of limiting the meaning of "person" from its settled presumptive meaning. *Stevens* expressly rejected petitioner's principal argument to that effect, which revolves around references in the FCA to military status and criminal penalties. Similarly, the fact that the FCA was motivated largely by frauds perpetrated by private Civil War contractors does not restrict the meaning of "person" in the FCA. This Court has never limited the coverage of the FCA or of other broadly written remedial statutes to the particular class of wrongdoers whose misdeeds prompted the passage of those statutes. To the contrary, this Court and lower courts for a century have interpreted the FCA broadly to reach all manner of parties involved in any manner of fraud against the federal government.

2. Congress did not intend, in the 1986 Amendments, to narrow the FCA's reach in any way, much less to put an end, *sub silentio*, to the FCA's prior applicability to municipal corporations.

a. Displeased by the near-disuse into which the FCA had fallen, Congress enacted the 1986 Amendments to revitalize the Act, expand its remedies, and give the federal government new enforcement tools. Given that purpose, it is implausible in the extreme that the 1986 Amendments intended, *sub silentio*, the momentous *curtailment* in the FCA's coverage that petitioners ask this Court to imply. Nothing in the Amendments' text implies such a curtailment. The Amendments left the term "person" unchanged, and a new provision subjecting municipal corporations to CID demands implies that Congress viewed such corporations as already subject to the FCA. Likewise, the Amendments' legislative history is inconsistent with an intent to end the FCA's coverage of municipal corporations.

b. Petitioner analogizes treble damages to common-law punitive damages, and asserts that because Congress in 1986 failed to specify that treble damages applied to municipal corporations, Congress must be presumed to have effectuated an implied repeal in 1986 of the FCA's previous coverage of such corporations. The argument has no merit.

(1) The presumption of Congressional intent invoked in *Newport* is one tool of ascertaining Congressional intent among many – not an absolute rule that trumps all other evidence of Congressional intent. *Newport* did not hold that Congress' failure to specify the applicability to municipal governments of punitive or treble damages automatically requires a finding that such governments were not subject to them.

(2) The presumption invoked by petitioners puts Congress on notice that in passing provisions allowing punitive damages, it should specify that municipalities are covered, or it will be presumed not to intend such coverage. But invoking that presumption to determine Congress' intent makes sense, and is a fair measure of congressional intent, only if Congress understands that

the remedy it is enacting is punitive in nature. When Congress increased the FCA's damages to treble damages in 1986, it believed that treble damages were essentially remedial, not punitive, in nature. In this belief, it was supported by extensive case law. While this Court observed many years later in *Stevens* that treble damages were "essentially punitive in nature," this conclusion casts no light on Congress' intent in 1986. Since Congress believed in 1986 that its new remedy was nonpunitive, it is inappropriate to infer anything about Congress' intent from its failure to specify that the treble-damages provision applied to municipalities.

(3) This Court has never invoked, and should not invoke, the common-law punitive damages presumption to justify an implied repeal of an entire statute's coverage of municipalities. Using the presumption for such a purpose would transform it from a sensible tool for ascertaining Congressional intent into a means for overruling clear Congressional intent.

c. Aside from its "presumption" argument, petitioner offers no other convincing reason to support its implausible reading of Congress' intent in 1986. In particular, the "policy" arguments offered by petitioner against applying treble damages to municipal corporations offer no basis for overruling Congress' choice. While treble damages have now been declared by this Court to be "essentially punitive" in nature, there remain important differences between treble damages and common-law punitive damages. As the court of appeals rightly held, those differences mitigate the concerns about imposing treble damages on municipalities. Moreover, petitioner's specific "policy" arguments amount to quarreling with the remedial scheme chosen by Congress to assure that federal money will not be stolen by local governments. As the presence of the United States *amicus curiae* in support of respondent attests, the FCA's applicability to municipal corporations, including its treble damage provision, is of

great importance both to recovering fraudulently spent money and to deterring future fraud.

ARGUMENT

I. CONGRESS INTENDED "PERSON" IN THE ORIGINAL FCA TO INCLUDE MUNICIPAL CORPORATIONS.

A. When Congress Enacted The FCA, The Term "Person" Presumptively Included Municipal Corporations.

The term "person" is nowhere defined in the FCA, but it has remained unchanged throughout the life of the FCA. The meaning of "person" in the FCA therefore depends on what Congress in 1863 intended it mean. *See Stevens*, 529 U.S. at 783, n.12.[1] That inquiry must begin with an analysis of what the term generally meant at that time. As this Court has held, we must assume that Congress was "familiar with common-law principles . . . and that they likely intended these common-law principles to obtain,

[1] *Stevens* held that the 1863 FCA was not intended to apply to States, since at that time a State was not presumptively a "person." Petitioner does not contend that this holding controls the very different issue of whether a *municipal corporation* as of 1863 was included in the term "person." Moreover, the constitutional considerations that influenced the statutory construction of the term "person" in *Stevens* are absent here. In *Stevens*, holding that States were "persons" under the FCA would have raised doubts of the FCA's constitutionality under the Eleventh Amendment. 529 U.S. at 787. Petitioner does not argue that the Eleventh Amendment would prevent municipal corporations from being sued under the FCA. *Accord., e.g., Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (Eleventh Amendment immunity does not "extend to counties and similar municipal corporations").

absent specific provisions to the contrary." *Newport*, 453 U.S. at 258.

Two settled propositions, both of which petitioner concedes, provide the starting point for analyzing what "person" presumptively meant in 1863:

- By 1869, when this Court decided *Cowles*, "person" presumptively included corporations, both private and municipal. *Monell*, 436 U.S. at 688. The presumption was codified two years later by Congress in the Dictionary Act of 1871, 1 U.S.C. §1 (1871).
- Congress meant "person" in the 1863 FCA to include *private* corporations, which have always been held subject to the FCA. *Stevens*, 529 U.S. at 782.

Taken together, these two facts, even without more, strongly point to the conclusion that in 1863, "person" presumptively included municipal corporations. Otherwise, (1) something happened in just six short years to give "person" a presumptive meaning in 1869 that it lacked in 1863; and (2) "person" in 1863 included one form of corporation (private) but excluded another form (municipal). Both notions are implausible – to say the least – and the historical evidence shows that both are wrong. By 1863, courts throughout America were routinely assuming that a municipal corporation is a "person." And by 1863, courts were routinely equating public and private corporations for purposes of being sued.

1. By 1863, "person" presumptively included municipal corporations.

Nothing happened between the passage of the FCA in 1863 and this Court's 1869 decision in *Cowles* to extend the common-law understanding of "person" to a new category – municipal corporations. To the contrary, by 1863, a municipal corporation's status as a legal "person"

was a non-controversial proposition, acknowledged by courts and commentators alike.

In 1848, in *Ross v. City of Madison*, 1 Ind. 281, 284 (1848), the court wrote:

> It may also be considered settled that municipal corporations are responsible to the same extent and in the same manner as natural persons, for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for the benefit of the cities or towns under their government.

The following year, in *Mayor and Alderman of Memphis v. Lasser*, 28 Tenn. 757, 760 (1849), the Tennessee Supreme Court wrote:

> It is well settled at this day both in England and America that such a [municipal] corporation is liable to be sued in actions of tort in like manner as natural persons. . . .

The following year, in *Comm'rs of Kensington v. County of Philadelphia*, 13 Pa. 76, 77 (1850), the Pennsylvania Supreme Court wrote:

> [A] municipal corporation is a person as distinctly within the letter of the act of 31st May 1841 [which allowed a "person or persons" whose property was destroyed by a mob to bring suit] . . . and why should it not be within its protection?

In 1854, a legal dictionary listed "corporation" as one of the definitions of "person." 2 John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union* 332 (1854).[2]

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[2] Bouvier's definition of "person" also indicates that when the plural is used in legislation – "persons" – it was more likely to mean only natural persons. Vol. II, at 333. The FCA uses the word in the singular.

In the decade before the Civil War, courts continued to act on this understanding. Four years before the FCA was passed, in *Cotes & Patchin v. City of Davenport*, 9 Iowa 227, 233 (1859), the Iowa Supreme Court commented:

> The doctrine that a municipal corporation is liable for malfeasance, or the negligence of its agents in the construction of public improvements upon the same principle and under the same circumstances as the individual citizen . . . now has been recognized in this state and may be regarded as well-established.

The following year, in *Argenti v. City of San Francisco*, 16 Cal. 255, 266 (1860), the California Supreme Court wrote:

> [I]n matters of contract, a public corporation is regarded merely as a legal individual and treated in all respects as a private person. . . . The course of modern decisions seems to place corporations, with regard to their mode of appointing agents, and making contracts in general, upon the same footing with natural persons.

In 1861, the Supreme Court of Wisconsin wrote:

> We have no doubt that the word 'person' extends to municipal corporations. . . . We can conceive of no possible reasons why the statute should not extend to corporations, public or private, for the remedy is quite as essential and necessary against them as against a natural person.

Rains v. City of Oshkosh, 14 Wis. 372, 374 (1861).

In short, the evidence confirms what common sense suggests. The presumption that "person" included municipal corporations, which petitioner admits prevailed in 1869, was as widespread and non-controversial six years earlier, when Congress enacted the FCA.

2. By 1863, municipal and private corporations were widely equated for purposes of being sued.

Since Congress in 1863 unquestionably intended "person" in the FCA to cover private corporations, petitioner necessarily asserts that Congress intended to distinguish, in the word "person," between private and municipal corporations in terms of their susceptibility to suit under the FCA. Again, the historical evidence shows the contrary.

Although the term "person" can be used in statutes for many different purposes, one of the most important purposes – and the purpose involved in the FCA's use of the term – is that of determining whether a defendant is subject to being sued. By 1863, it was widely accepted that private and municipal corporations in this respect rested on the same footing. Like private corporations, public or municipal corporations "were treated as natural persons for virtually all purposes of constitutional and statutory analysis . . . [,] were routinely sued in both federal and state courts[, and] were regularly held to answer in damages . . . for common law actions for breach of contract." *Owen v. City of Independence, Missouri*, 445 U.S. 622, 639, n.19 (1980) (citing pre-1863 cases). Municipal corporations received the same treatment as private corporations for purposes of being subject to suit in federal court.

In fact, in that era, fewer distinctions were drawn between private and public corporations than might be drawn today. Today it is less common to refer to local governments simply as "corporations." Not so in pre-FCA America. In *Board of Com'rs of Knox Co. v. Aspinwall*, 65 U.S. (24 How.) 376, 383-85 (1859), this Court referred to Knox County as "the corporation," without qualifiers like "public" or "municipal," and held that subjecting "the corporation" to a petition for mandamus in federal court was "agreeable to the principles of the common law." *Id.* at 385. *See also Clark v. Mayor of Washington*, 25 U.S. (12 Wheat.) 40 (1827) (this Court referred to the City of

Washington as "the corporation" and held it responsible for the acts and contracts of its agents); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 51-52 (1815); *Trustees of Dartmouth College v. Woodward*, 65 U.S. (4 Wheat) 518, 594, n.12 (1818). As a district court commented in 1862:

> Though the metaphysical entity called a corporation, may not be physically a citizen, yet the law is well settled that it may sue and be sued in the courts of the United States. . . . That the defendant is a municipal corporation and not a private one, furnishes a stronger reason why a citizen of another state should have his remedy in this court.

McCoy v. Washington County, 15 F.Cas. 1341, 1343 (W.D.Pa. 1862).

The federal courts were not alone. States treated municipal corporations essentially like private corporations in terms of their susceptibility to suit, as well as other rights and responsibilities. For example, in *Rains v. City of Oshkosh*, quoted *supra* at 14, the Wisconsin Supreme Court, in equating municipal corporations to a "person," expressly equated public to private corporations. In 1858, in *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, 471-72 (1858), the California Supreme Court observed that

> [t]he reports in other States are full of adjudged cases where actions upon implied contracts have been sustained against municipal corporations. They have been argued by able and distinguished counsel, and decided by eminent Judges, and the distinction has never been made between the liability of a private corporation and a municipal corporation, under circumstances analogous to those presented in the case at bar.

That same year, in *Henry Atkins & Co. v. Town of Randolph*, 31 Vt. 226, 237 (1858), the Vermont Supreme Court wrote:

> As far as a municipal corporation is endowed by law with the power of contracting . . . and subject

> to the liabilities incident to the exercise of such power and capacity, thus being invested with legal rights as to property and contracts, and made subject to legal liabilities in respect thereto, [it is] ascertained and enforced by suit in the ordinary judicial forums, upon the same principles, and by the same means as in the case of a private corporation. . . . As to third parties who seek to enforce pecuniary liabilities against towns arising upon contract, such towns are merely private corporations or individuals.

See also Newport, 453 U.S. 247, 259, n.19 (1981) (citing to pre-1863 case of *Bailey v. Mayor of New York*, 3 Hill 531, 539 (N.Y.Sup.Ct. 1842), *aff'd* 2 Denio 433 (1845)) (municipal corporations "stood on the same footing as a private corporation" and, like private corporations, were "to be treated as a natural person subject to suit for a wide range of tortious activity").[3]

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[3] The New York *amici* argue that in 1863, only some municipalities were true corporations, while others were "quasi-corporations." (In this distinction, where it existed, municipal corporations, which were created at the behest of their residents, were "corporations," while quasi-corporations included public entities which were not created at the behest of their residents.) As a result, *amici* argue, there could not have been a presumption that municipalities were "corporations." Brief of *Amici* City of New York *et al.*, pp. 7 ff.

It is unclear where this argument leads, since no one asserts that Cook County was anything other than a full-blooded "corporation" as of 1863. But in any event, the argument, whatever its historical accuracy, has no merit in the context of a statute like the FCA, in which claims against corporate defendants grow out of their contractual relationship with the federal government as grantor of funds.

Where it existed, the 19th-century distinction between corporations and quasi-corporations was meaningful only in relation to certain kinds of tort liability which are not relevant to the FCA. Because they "did not compose a corporate body; but were merely individuals" with no specified authority or powers, some entities, like school boards, "may be considered . . . quasi-corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage," *Inhabitants of Fourth School Dist. in Lombard v. Wood*, 13 Mass. 193, 198 (1816),

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Contemporary treatises also explain that public and private corporations alike are subject to suit. An 1852 corporate law treatise reported:

> It is indeed now, and has ever been, perfectly well established, that corporations, whether

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and therefore were not subject to suit when they failed to perform duties not imposed upon them. *See, e.g., Eastman v. Meredith*, 36 N.H. 284 (1844). But even in Massachusetts, and the other States that followed this line of reasoning, a municipal body would have been liable for the wrongful willful acts of its agents and upon its contracts. *Thayer v. Boston*, 36 Mass. 511, 516 (1837). Later cases had little trouble, however, finding quasi-corporations liable, even in tort, especially when they had specifically undertaken or been charged with performing a specified function. *County Commissioners of Anne Arundel County v. Duckett*, 20 Md. 468 (1864) (holding a county liable for the death of a horse as a result of an improperly maintained road).

The limited nature of this distinction between municipal corporations and quasi-corporations, where the distinction existed, was clearly established. In 1872, Dillon's treatise, although reporting on the variations among the states regarding liability in negligence, found no ambiguity with respect to suits involving activities local units of government had affirmatively undertaken:

> [the rule limiting the liability of quasi-corporations, including townships and counties, from liability in negligence] is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed upon all towns, without their corporate consent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred upon it, at its request.

John F. Dillon, *A Treatise on the Law of Municipal Corporations*, §763 at 874 (2d ed. 1872). Local governments that accepted grants from and entered into contracts with the federal government were clearly under the sort of particular obligation that would have rendered them susceptible to suit under the FCA for misspending that money. Indeed, despite the reluctance of some states to hold certain types of municipalities liable in tort – a reluctance that extended, as Dillon's treatise demonstrates, at least until 1872 – Congress in 1871 imposed (as *Monell* held) a form of tort liability on all local governments under §1983, using the same term, "person," that is at issue here.

> public or private, may commence and prosecute all actions, upon all promises and obligations, implied as well as expressed, made to them, which fall within the scope of their design, and the authority conferred upon them. [Citing, in a footnote, *McKim v. Odon*, 3 Bland (Md) Ch.R.417, and *Gordon's Exrs v. Mayor, &c. of Baltimore*, 5 Gill (Md) R.231.]
>
> * * *
>
> Secondly, of the liability to be sued. Having thus considered the subject of the corporate right to sue, we are next to treat of the corporate liability to be sued. The ancient doctrine was, that the action of assumpsit could not be supported against a corporation, unless in the case of promissory notes, and other contracts sanctioned by particular legislative provisions. . . . But it having since become well settled, by the more recent decisions of the Courts of the United States, that corporations may act by parol [internal citations omitted], it has resulted, as a matter of course, that assumpsit will lie against a corporation, and such is now the established doctrine in this country.

Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate*, at 401, 411 (7th ed. 1852).[4] Similarly, John Bouvier's 1854 legal dictionary (cited above at p. 13) under "corporation," listed "[p]ublic corporations, which are also called political, and sometimes municipal corporations. . . ." Vol. I, p. 318.

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[4] In fact, counties were routinely sued in state courts over financial obligations in the mid-1800s. *See, e.g., Crawford County v. Wilson*, 7 Ark. 214 (1846); *Gilman v. County of Contra Costa*, 8 Cal. 52 (1857); *Justices of the Inf. Court of Talbot County v. House*, 20 Ga. 328 (1856); *McDaniel v. Yuba County*, 14 Cal. 444 (1859); *Autauta County v. Davis*, 32 Ala. 703 (1858); *Boone Landfill, Inc. v. Boone County*, 51 Ill. 538 (1972) (acknowledging the ability of counties to sue and be sued in Illinois since 1827).

In short, the historical evidence shows that the same presumption recognized by *Monell* to prevail in 1869 – that "person" included municipal corporations – prevailed when Congress passed the FCA six years earlier. And that evidence shows that as of 1863, no basis existed for presuming that a term – "person" – that included private corporations would exclude municipal corporations.

As that evidence further shows, there is no merit to petitioner's claim that this Court's 1869 decision in *Cowles* broke new legal ground. Pet. Br., 13-16. In 1844, this Court had held that a private corporation would be treated as a "person" and as a citizen of its state of incorporation, and was hence subject to suit under diversity jurisdiction. *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). In 1853, in *Aspinwall*, this Court held that a county – which, as discussed above, it called "the corporation" – was subject to suit. 65 U.S. (24 How.), at 383-85. In *Cowles*, this Court "automatically and without discussion extended [*Letson*] to municipal corporations," and held that municipal corporations, like private corporations, were presumptively included in the term "person." *Monell*, 436 U.S. at 688. *Cowles* did not purport to change the law, but to make a non-controversial application of well-established law. Even the holding in *Cowles* – that a municipal corporation was a "citizen" of the state in which it was situated and therefore was subject to suit in federal court based on diversity jurisdiction – was non-controversial.[5] As this Court explained in *Cowles*:

[5] Petitioner emphasizes *Cowles*' initial observation that

> [t]he record presents but one question which has not been heretofore fully considered and repeatedly adjudicated. That question is, whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois.

Pet. Br., 16, quoting 74 U.S. (7 Wall.), at 121. While this Court indeed had not been called upon to address this question before, it found the

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> The question [of] whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States . . . presents but little difficulty.
>
> [Since *Letson*,] a corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen with the meaning of the Constitution giving jurisdiction founded upon citizenship. . . .
>
> It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county.

74 U.S. (7 Wall.) at 121-22.

Moreover, contrary to petitioner's and some *amici*'s arguments, *Monell* does not "date the presumption that municipal corporations were persons . . . from the 1869 decision in *Cowles*." Brief *Amici Curiae* of City of New York *et al.*, at 12. Instead, *Monell* recognizes the obvious: "Under [the *Letson*/*Cowles*] doctrine, municipal corporations were routinely sued in the federal courts." As an example, *Monell* cited an 1864 opinion in *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1864), which itself cited other pre-1864 cases. 436 U.S. at 673.

Similarly, nothing supports petitioner's implicit contention that the passage of the Dictionary Act in 1871 marked a sudden new understanding of the term "person." Pet. Br., 14. To the contrary, this Court in *Stevens* cited the 1871 Dictionary Act to support its holding that corporations "are presumptively covered by the term 'person'" in

answer easy. Given that the board of supervisors was properly characterized as a corporation, the answer followed immediately from *Letson*, a case decided in 1844. *Cowles* found no difficulty in stating that Mercer County was a "corporation." Given *Aspinwall*, decided many years before, and abundant other authority discussed in this brief, that question was non-controversial.

the 1863 FCA. 529 U.S. at 782, citing 1 U.S.C. §1. Both *Cowles* and the Dictionary Act simply articulated a preexisting and well-established common-law understanding of what "person" meant.

B. The 1863 FCA's Language And Legislative History Show No Intent To Negate The Common-Law Presumption That A Municipal Corporation Was A "Person."

Since the same presumption about municipal corporations as "persons" existed in 1863 as in 1869, the FCA's use of that term includes municipal corporations unless clearly excluded by the language or legislative history. Neither the language nor the legislative history effectuates such an exclusion.

1. Nothing in the 1863 Act's text excludes municipal corporations.

Nothing in the 1863 FCA defined "person" at all. There is nothing in the text of the Act excluding municipal corporations.

Petitioner nonetheless purports to find textual support for such an exclusion in "two features" of the Act: (a) the FCA's use of military status to qualify the term "person"; and (b) the inclusion of criminal penalties. The argument is that corporations (municipal or private) cannot be in the military, and cannot be imprisoned. Pet. Br., 12-13.

Petitioner's heavy emphasis on this argument is puzzling, for it was made and rejected in *Stevens*, as petitioner belatedly and indirectly concedes. Pet. Br., 19. As *Stevens* recognized, accepting petitioner's argument would require the conclusion that the FCA does not apply to any kind of corporation, public or private. This Court declined to reach such a conclusion, which would destroy the FCA. The Court refused to "cast doubt upon the courts' assumption that §3729(a) extends to corporations ...

because the presumption with regard to corporations is ... [that, unlike States] they are presumptively covered by the term 'person,' see 1 U.S.C. §1." 529 U.S. at 782.

In short, because the term "person" as understood in 1863 covers corporations, those "features" of the Act that apply only to natural persons do nothing to alter that plain meaning. *See United States v. Union Supply Co.*, 215 U.S. 50, 54 (1909) (even where a criminal provision provided for mandatory imprisonment, as well as a fine, it was applicable to corporations). If those "natural person" features do not remove private corporations from the coverage of the FCA, no principled argument can be made that they remove public corporations. It is as impossible to enroll a public corporation as a private one in the military, or to imprison it.

2. The legislative history supports inclusion of municipal corporations in the FCA.

Petitioner claims that Congress' focus on Civil War contractors when it passed the FCA precludes inclusion of municipal corporations. And petitioner claims that amendments to the original bill between its introduction and ultimate passage, narrowed its scope from "any person" to "any person" modified by military status and shows Congress' intent to exclude municipal corporations. Pet. Br., 17-19. Both arguments are contradicted by the legislative and historical record.

a. Congress intended the FCA to have broad scope.

The impetus for the 1863 Act was "stopping the massive frauds perpetrated by large contractors during the Civil War," *United States v. Bornstein*, 423 U.S. 303, 309 (1976), who were "plundering ... the public treasury in the purchasing of necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958). These "necessities of

war" were not limited to munitions produced by individual contractors. They included everything "required for human use and consumption in order not only to sustain life but to destroy it," such as contractors for food, clothing, arms and munitions, hospitals and hospital supplies, and all modes of transportation from mules to railroads and steamships. Robert Tomes, "Fortunes of War," *Harpers' Monthly*, 227 (July, 1864). These contractors – and fraudsters – included the railroads, coal mines, and other corporate entities. *Id.* at 227-28. This context supports the presumption, accepted by this Court in *Stevens*, that Congress did not intend to limit "person" to natural persons.

Petitioner, nevertheless, reads this historical context to mean that the narrow purpose of the 1863 statute was to ferret out fraud by munitions contractors during the Civil War and that because there is no record of local governments selling munitions to the federal government in 1863, Congress could not have intended to cover units of local government. But there is no evidence that Congress intended to limit the scope of the FCA to the particular abusers whose misdeeds prompted the Act's passage. Such a limitation of the FCA's reach would contradict years of jurisprudence interpreting it broadly to reach all manner of parties involved in any manner of fraud against the federal government. *See, e.g., Rainwater v. United States*, 365 U.S. 590, 592 (1958) ("the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims"); *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) ("[i]n the various contexts in which questions of proper construction of the [FCA] have been presented, the Court has consistently refused to accept a rigid, restrictive reading"); *id.*, at 233 (construing the Act to extend to "all fraudulent attempts to cause the Government to pay out sums of money"). The original FCA was written broadly; its scope was unlimited in terms of time period, types of fraud, or part of the government to which false claims are presented.

Moreover, false claims by municipal corporations cause the federal government the same harm as do fraudulent claims by private persons. As this Court reasoned in *Monell*:

> since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by §1 [42 U.S.C. §1983], and, further, since Congress intended §1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of §1.

436 U.S. at 685.

More generally, petitioner's argument, which raises the particular historical impetus for the Act above the broad language that Congress chose to employ, is an unacceptable method of statutory interpretation. This Court has never limited the reach of broadly written remedial statutes to the particular classes of wrongdoers who historically provoked the statutes' passage. A prime and recent example is RICO, 18 U.S.C. §1964 (2000), which was passed because of Congress' "perceived need to combat organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248 (1989). This Court declined to limit RICO to the context of organized crime, because Congress "chose to enact a more general statute." *Id. See also National Organization for Women, Inc. v. Scheidler*, 510 U.S. 1215 (1994) (holding that RICO does not require an economic motive and allowing case to proceed against abortion protesters who tried to shut down abortion clinics).

b. The amendments to the FCA bill prior to its passage provide no support for petitioner's restrictive reading.

As originally introduced, the FCA would have provided that "any person" who presented a false claim "shall be deemed guilty of a high crime and misdemeanor, and

shall be deemed and treated as part of the land and naval forces in service of the United States," and shall be "held for trial by a court martial." S.467, 37th Cong., 3rd Sess. (Jan. 1863). As ultimately passed, however, the FCA applied to "[a]ny person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war" *and* "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service or any claim against the United States or any department thereof. . . . " Cong. Globe, 37th Cong., 3rd Sess. (1863) (hereinafter "*Globe*"), at 696, 698. The statute provided that persons in the military would be subject to court martial, *id.*, at 696, and a person not in the military shall "forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages which the United States may have sustained . . . together with costs of suit" and shall be punished by imprisonment or by fine. *Id.* at 698.

Petitioner argues that the change from "any person" to "any person" modified by military status "narrowed substantially" the FCA and supports the argument that local governments were not included in the original FCA. Pet. Br., 17. Petitioner misreads the Act "as originally introduced," and, as a consequence, its argument is backwards.

The original sponsors believed that "contractors for furnishing supplies to the Army and Navy are just as indispensable as soldiers," and therefore should be subject to the military courts and military justice. *See Globe*, at 955. Moreover, Congress wanted "speedy and exemplary justice," *Globe*, at 954-56, and it was the apparent consensus that this was best provided in the military courts. *Id.* Congress was split, however, over whether court martial was appropriate or available for all fraudsters. *See, e.g., Globe*, at 957 (Sen. Davis) ("The distinctive features of the bill fix its paternity on the Secretary of War. He is prone to bring every person and every act within military law and military courts. But if the honorable Senator will change

his bill so as to make the offenses declared by it civil offenses, to be tried according to the course of the common law, I will support it with much satisfaction").

The final version of the FCA did not in fact subject all fraudsters to court martial. Thus, rather than limiting the scope of the term "person," that final version made clear that it was to be given broad scope. Those in the military, who are indeed limited to natural persons, would be subject to court martial. Everyone else, however, was liable for a range of civil and criminal penalties designed both to deter and to make the government whole. S.467, 37th Cong. 3d Sess., §§1-4.

Thus, nothing about the change cited by petitioner supports its argument. If anything, the change shows the opposite – the application of penalties that, unlike court martial, could be applied to corporations, both public and private.

In sum, nothing in the text or legislative history of the 1863 FCA justifies departing from the prevailing common-law understanding of what "person" presumptively meant. That understanding included corporations, municipal or private. Congress intended in 1863 that its broad remedial statute cover both kinds, not just private ones.

II. CONGRESS HAD NO INTENT IN 1986 TO REPEAL THE FCA'S APPLICATION TO MUNICIPAL CORPORATIONS.

Petitioner argues that even if the FCA originally reached municipal corporations, Congress *sub silentio* intended to eliminate that coverage when it amended the FCA in 1986 to change the damages provision from double damages to treble damages.[6]

[6] With respect to the 1986 Amendments, the issue this case presents is the polar opposite of the issue in *Stevens*. *Stevens*, after

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This argument has no merit. Petitioner asks this Court to reach an overwhelmingly unlikely conclusion about Congress' intent, given the context of the 1986 Amendments, the legislative history, and the text of the amendments. The presumption invoked by petitioner against applying punitive damages to municipalities in the absence of specific statutory language cannot justify a finding that in 1986 Congress repealed the FCA's preexisting coverage of municipal corporations. Nor do petitioner's other arguments justify its misreading of Congress' intent.

A. The purpose, legislative history, and text of the 1986 Amendments make it overwhelmingly unlikely that Congress intended to eliminate the FCA's preexisting coverage of municipal corporations.

The implied repeal argued by petitioner would have been a momentous change in the FCA's coverage. Petitioner asks the Court to believe Congress intended to make that momentous change (1) without changing the key word "person" that defines who is subject to the FCA; (2) through amendments which were intended to strengthen the FCA and expand its coverage; and (3) without a word in the legislative history indicating an intent to make the change petitioner asserts, and with ample legislative history indicating a contrary intent.

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holding that the term "person" in the original 1863 Act was not intended to apply to States, then analyzed whether the 1986 Amendments had effectuated, *sub silentio*, "a broadening of the term 'person' to include States." 529 U.S. at 783. The Court concluded that the Amendments had not done so. Here the situation is reversed. As shown in Section I, the 1863 FCA *did* intend to include municipal corporations in the term "person," and the issue is whether the 1986 Amendments, *sub silentio*, intended to *eliminate* that preexisting coverage. As will be discussed in the text, the answer is no.

This Court will rarely meet with a more factually-improbable assertion about Congress' intent in passing a statute. The purpose, text, and legislative history of the 1986 Amendments render petitioner's reading of Congress' intent unacceptable.

The overall purpose. The 1986 Congress amended the FCA with a clear and single purpose in mind – "to make the statute a more useful tool against fraud in modern times ... provid[ing] the Government's law enforcers with more effective tools [and] encourag[ing] any individual knowing of Government fraud to bring that information forward." S.Rep. 99-345 at 2. Toward that end, everything about the 1986 Amendments aggressively expanded, not cut back, the reach of the FCA:

- To encourage "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity" and without whom detection of fraud is "very difficult" (S.Rep. 99-345 at 4), Congress increased the percentage of the recovery to be awarded whistleblowers and created a whistleblower protection provision for relators and witnesses who engage in "lawful acts done ... in furtherance of an action under" the FCA. §§3730(b) and (h).
- Because "many courts had construed the Act to require actual proof of fraud and intent to submit false claims," Congress lowered the liability or standard of proof bar to require proof only that defendant "knows or has reason to know" that the claim is false. S.Rep. 99-345 at 7; §3729(b).
- Congress "increase[d] the recoverable damages [and] raised civil forfeiture" under the FCA to update the penalty enacted in 1863 "to reflect the passage of time and the effects of inflation," and to make the Federal Government whole for its losses. H.R.Rep. No. 99-660, at 17, 20 (1986); §3729(a).

- Concluding that it needed to enhance the government's "investigative tools," S.Rep. at 7, Congress granted new Civil Investigative Demand (CID) authority to the Department of Justice to aid in its investigations of FCA cases. §3733(a).

Given the aggressively expansive purpose of the 1986 Amendments, it is all but unthinkable that Congress intended, in the same statute, to cripple the government's ability to fight fraud by eliminating a huge category of recipients of federal funds – municipal corporations – who had previously been subject to the FCA. Had Congress had such an intent in this expansive statute, one would expect some indication of it, either in the text or the legislative history. Instead, the indications all run the other way.

The text. Not a word in the text of the 1986 Amendments suggests an intent to eliminate or cut back any aspect of the coverage of the FCA. The Act extends that coverage through its use of the word "person," and Congress pointedly left that word unchanged, as this Court noted in *Stevens*. 529 U.S. at 783, n.12. Moreover, when Congress added the new Civil Investigative Demand provision, it made municipal corporations subject to that provision. §3733(l)(4). As the court of appeals noted, that fact "points to a finding of continued municipal liability." 277 F.3d at 294.

The legislative history. Not a scrap of legislative history even hints that Congress intended to cut back the scope of the FCA in any way, much less to eliminate a huge category of previously-covered defendants. All the relevant legislative history points the other way.

First, in describing the explosion in frauds perpetrated against the United States, Congress complained that fraud "permeates generally all government programs," explicitly mentioning "welfare and food stamp programs" and "disaster relief programs." *See* S.Rep. 99-345 at 2. Local governments play a major role in the administration of both of these types of programs. *See, e.g.*,

42 U.S.C. §5141 *et seq.* (disaster relief); 42 U.S.C. §602(a)(1) (1982 Supp.); 7 U.S.C. §2012(n)(1) (1982 & 1985 Supp.) (welfare and food stamps). In light of this legislative history, petitioner's claim that "the focus in 1986 was on the defense industry and the fraudulent conduct of private contractors," Pet. Br., 31, is untenable. Congress was focusing on all programs, including those that provide money to local governments.

Second, the Senate Report asserts that historically "[t]he term 'person' [in the FCA] is used in its broad sense to include . . . states and political subdivisions thereof." S.Rep. 99-345 at 8. In *Stevens*, this Court would later determine that Congress had misread the 1863 Congress' intent as to States. But that mistake does not lessen the probative value of this statement about the 1986 Congress' intent. If municipal corporations were subject to the original FCA – and as Section I of this brief has shown, they were – this statement in the Senate Report is powerful evidence that eliminating that coverage was the last thing in the world Congress intended.

Third, the Senate Report specifies that the Act's new whistleblower-protection provision, §3730(h), was to apply to public-sector employees. S.Rep. 99-345 at 34-35. This statement shows a Congressional assumption that municipalities were already subject to the Act. For the FCA's anti-retaliation provision to protect municipal employees, they must have first made disclosures "in furtherance" of an FCA action (§3730(h)). The natural inference is that the FCA action they are furthering is an action against *their employer*. As the court of appeals noted, the employer is only likely to be angered by their disclosures if they threaten the *employer* itself with FCA liability:

> [u]nless municipalities are subject to suit under the FCA, Congress would have no reason to be concerned that municipalities might retaliate against their employees for bringing FCA claims. Given that states are excluded from the definition of "person" within the FCA, the only public

> entities remaining are municipal corporations and other political subdivisions of states which are not arms or agencies of state government.

277 F.3d at 987. In short, by indicating an intent to bring municipal employees under the whistleblower protections, the Senate unmistakably indicated its understanding that municipal employers are already covered by the FCA. Again, that understanding is irreconcilable with an intent to repeal that existing coverage through the 1986 Amendments.

Fourth, the Senate Report explicitly and approvingly described an FCA lawsuit against the manager of a local housing authority in his official capacity. *Smith v. United States*, 287 F.2d 299 (5th Cir. 1961)[7]; *see* S.Rep. 99-345 at 9. Congress' reliance on this case is further evidence that it knew that local governments were capable of violating the FCA.

In short, all the relevant legislative history refutes the notion that Congress intended, *sub silentio*, to cut back the FCA by eliminating municipalities' previous coverage. While petitioner quibbles with some of this legislative history, it has none of its own to offer. For example, petitioner asserts that there were no reported cases as of 1986 under the FCA against municipalities. Pet. Br., 24, n.12. But there were cases. *See, e.g., United States v. Board of Education of City of Union City*, Civil Action No. 83-2651, 1985 U.S. Dist. LEXIS 14917 (D.N.J. 1985); *United States v. Escondido Union School Dist.*, No. 78-0845-S (S.D.Cal.). In any case, before 1986, there were few FCA *qui tam* cases of *any* kind. A major impetus behind the 1986 Amendments was a desire to reinvigorate the FCA.

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[7] At the time *Smith* was decided, the Beaumont Housing Authority was a local unit of government established pursuant to Texas' Housing Co-Operation Law, 45 Leg. chs. 460, 461 (1937); as revised, Tex. Loc. Gov't Code Ann. §393 (1986).

B. The "Express-Language" Common-Law Presumption Cannot Be Used To Infer An Implied Repeal Of The FCA's Preexisting Coverage Of Municipal Corporations.

It would be disturbing if the law compelled this Court, in considering Congress' 1986 intent, to reach a conclusion that is so manifestly untrue – that Congress, in an aggressively expansive amendment to the FCA, intended silently to destroy the statute's existing coverage of municipal corporations. But in truth, nothing in this Court's cases justifies such a result.

Petitioner's principal argument for an implied repeal of FCA coverage runs as follows: (1) in *Newport* and *Stevens*, this Court invoked the principle that a statute employing common-law punitive damages is presumed not to apply to public bodies unless Congress specifically says so; (2) treble damages were held in *Stevens* to be "essentially punitive" in nature and are therefore covered by this principle; (3) the 1986 Amendments made treble damages mandatory as to all defendants found liable under the FCA; (4) Congress did not specify that treble damages apply to municipal corporation defendants; and (5) therefore this Court, regardless of other evidence of Congress' intent, must infer an intent by Congress to remove municipal corporations from the coverage which up until then had applied to them. This argument lacks merit for three separate reasons.

1. *Newport* and *Stevens* do not create an irrebuttable presumption of congressional intent.

Newport asked whether Congress, when it enacted §1983 in 1871, had intended to subject municipalities to punitive damages under the new statute, and concluded that Congress had not. Among other reasons, because municipalities were immune from punitive damages at common law and because Congress provided neither a

damages regime in §1983 nor expressed an intent to abrogate common-law immunity, the Court concluded that Congress had not in fact abrogated it *sub silentio*. *Newport*, 453 U.S. at 258 (Congress did not override existing common law "by implication").

Petitioner reads *Newport* to create a single controlling test of Congressional intent for the applicability of punitive damages. In petitioner's view, if punitive damages are involved, and Congress does not specify that municipalities are subject to them, that creates an irrebuttable presumption of Congressional intent, and nothing else matters. In petitioner's view, because Congress did not jump through this one particular hoop – specifying that treble damages apply to municipalities – all the other indications of Congressional intent on the matter, discussed above, must be ignored, and the implausible conclusion must be accepted that Congress intended *sub silentio* to repeal the FCA's preexisting coverage of municipal corporations.

This view reads *Newport* far too broadly. If *Newport* had intended to create this unique test of Congressional intent, most of the opinion would have been unnecessary. This Court could have simply pointed to the absence of any language in §1983 about punitive damages being imposed on municipalities, and ended its inquiry. Instead, *Newport* first considered the state of the common law when §1983 was enacted and then looked to see if anything in the legislative history could overcome the common-law presumption that punitive damages would not be imposed. *Newport* further examined the relationship between punitive damages and the goals of §1983 to see if immunizing local governments from punitive damages was consistent with those goals. The Court also weighed the broad scope of §1983, the wide discretion that juries have in awarding extremely large punitive damages, the fact that punitive damages are a windfall to an already fully-compensated plaintiff, and the prejudicial effect that a municipality's "unlimited taxing power" might have on a

jury. After considering this complex calculus, the Court concluded that Congress had not intended municipalities to pay punitive damages under §1983. While the common-law presumption against applying punitive damages to municipalities in the absence of a specific statutory provision played a significant part in this calculus, *Newport* did not treat this factor as trumping all other evidence of Congressional intent.

Nor did *Stevens*. There, this Court described the FCA's treble damages regime as "essentially punitive," and used that fact as one factor among many to conclude that the 1986 Amendments had not intended to broaden the original FCA to cover States. 529 U.S. at 784-85.

In short, this Court has used the "express language" presumption as one tool among many for ascertaining Congressional intent. That common-law presumption about punitive damages and municipalities cannot be used blindly to reach a conclusion about Congressional intent that is overwhelmingly contrary to the purpose, text, and legislative history of the 1986 Amendments.

2. Because Congress in 1986 did not believe treble damages to be "essentially punitive in nature," application of the punitive-damages presumption about congressional intent is unjustified.

The presumption discussed by this Court in *Newport* and *Stevens* puts Congress on notice that in enacting provisions that are "essentially punitive in nature" (*Stevens*, 529 U.S. at 784-85), it should specify that municipalities are covered, or this Court may presume that Congress did not intend such coverage. Applying that presumption makes sense, and is a fair measure of congressional intent, where the remedy being enacted has been established as "essentially punitive." In such a situation, when Congress fails to specify that the punitive remedy applies to municipalities, a court usually

(although not invariably) has good reason to infer Congress' intent.

But applying that presumption makes no sense, and is not a fair measure of congressional intent, when Congress has reason to believe that its remedy is *not* "essentially punitive in nature." In such a situation, one would not necessarily expect Congress to specify the applicability of its remedy to municipal corporations, and no conclusion can be drawn one way or another from Congress' failure specifically to address this issue in the statute's text.

Such is the case with the 1986 Amendments. Although *Stevens* declared, for the first time, that treble damages were "essentially punitive in nature," this was not the prevailing understanding of treble damages when Congress imported them into the FCA in 1986. In 1986, Congress believed that treble damages were essentially remedial, not punitive, in nature. In this belief, it was supported by extensive case law.

Congress took up consideration of the 1986 FCA Amendments against settled law that the preexisting *double* damages scheme was compensatory, not punitive. *See United States v. Bornstein*, 423 U.S. 303, 315 (1976) ("double damages are necessary to compensate the government completely for the costs, delays, and inconveniences occasioned by fraudulent claims"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-53 (1943) (double-damage provision is designed "to provide for restitution to the government of money taken from it by fraud" and "to make sure that the government would be made completely whole").

Nor were *treble* damages established as "essentially punitive in nature" in 1986. As petitioner acknowledges, "[p]rior to *Stevens*, the law was unsettled as to whether the FCA's [new treble] damages under the 1986 Amendments were punitive." Pet. Br., 22. The year before the 1986 Amendments, this Court had held that the Clayton Act's treble damages were essentially remedial:

> Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by §4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury. "Section 4 is in essence a remedial provision. . . . Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing. . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy. (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485-86 (1977).

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635-36 (1985). Two years later, in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987), the Court observed that "[b]oth RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorneys' fees." *See also American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 557-76 (1982) (same); *Restatement (2nd) of Agency* §217C, Comment C (distinguishing between punitive damages and statutory treble damages for purposes of imposing vicarious liability). Furthermore, only a few years earlier, the Court had upheld the application of antitrust statutes against municipalities despite the potential for treble damages should liability be found. *See Community Communication Co. v. City of Boulder*, 455 U.S. 40, 50-51 (1982); *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 396 (1978).

Given the case law as of 1986, Congress justifiably viewed its increase in FCA damages from double to treble as essentially remedial, not punitive, in nature. The legislative history of the 1986 Amendments makes this view clear. For example, the Senate Report stated: "False Claims Act proceedings are civil and remedial in nature

and are brought to recover compensatory damages." S.Rep. 99-345 at 31. It stated that the FCA is "remedial" even though it permits a treble recovery. *Id.* The House Report agreed. H.R.Rep. No. 99-660 at 25 (1986) ("[t]he False Claims Act is basically a remedial statute"). The Senate Report explained the rejection of any specific intent to submit a false claim and the adoption of "the preponderance of the evidence standard" as the appropriate standards for civil, "remedial statutes" like the FCA. S.Rep. 99-345 at 7, 31.

Equally revealing is the legislative history of how the treble-damage provision came about: it was a simplified version of a measure that was introduced as an expressly *compensatory* provision. The original House version of the 1986 FCA Amendments provided for a separate award of "consequential damages" – *i.e.*, damages beyond those encompassed in the return to the federal government of the money it had given the defendant – in addition to the double damages already available. *See* S.Rep. 99-345 at 39; 132 Cong.Rec. H6479 (1986). The House favored double damages plus consequential damages to "make the Government whole for its losses; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation." H.R.Rep. 660 at 20. *See also* 132 Cong.Rec. H6480 (1986) (the House bill "would make consequential damages the measurement standard – thus allowing a recovery for indirect losses that are the result of the fraud as well as actual direct losses. This is a realistic, fair change which ensures the recovery will reflect actual replacement cost in every instance"). Rather than employ this two-pronged determination of different kinds of actual damages, Congress ultimately settled on the simpler scheme of treble damages. *See* 132 Cong.Rec. S11238 (Aug. 11, 1986); 132 Cong.Rec. S15036-37 (Oct. 3, 1986); 132 Cong.Rec. H9388 (Oct. 7, 1986). The point is that all advocates of increasing the measure of FCA damages had compensation in mind, not punishment.

Moreover, Congress had a specific reason to believe that increasing the FCA damages from double to treble was necessary to assure full compensation to the federal government. The Amendments increased the percentage paid to relators, thereby increasing the costs to the government of a successful *qui tam* action and correspondingly reducing the government's share of a recovery. The increase from double to treble damages would offset this cost and help assure full compensation to the government at the end of the case.

Petitioner cites a single statement of a single Congressman, Rep. Fish, in support of the assertion that "Congress understood the [treble] damages to be punitive." Pet. Br., 26, citing 132 Cong.Rec. 22,336-37 (1986), where Rep. Fish alluded to the "deterrent effect" of the statute and refers to "punishment." His statement in no way contradicts the congressional consensus that the amended FCA would continue to be essentially remedial in nature. This Court has long established that neither a damage regime's deterrent effect nor the characterization of a damage regime as "the penalty" or "the punishment" automatically converts it to a punitive regime. *See, e.g., Hudson v. United States*, 522 U.S. 102 (1997) ("[a]ll civil penalties have some deterrent effect"); *Newport*, 453 U.S. at 268 (explaining that §1983's purposes are primarily compensation and deterrence as distinguished from punishment); *United States v. Halper*, 490 U.S. 435, 447, n.7 (1989) ("for the defendant even remedial sanctions carry the sting of punishment"). Indeed, Rep. Fish was talking about the *unamended*, double-damages version of the FCA, and as discussed above, it was and is settled that double damages are essentially remedial in nature.

In summary, when Congress increased FCA damages from double to treble in 1986, it believed its action was essentially remedial not punitive, in nature, and the law as it then existed made that assumption highly reasonable. Eventually, of course, this Court concluded that treble damages *were* "essentially punitive in nature." But

until this Court spoke on that issue, Congress was entitled to believe the opposite. Because it did, no inference about Congress' intent can be drawn from its failure to have the amended FCA specify that treble damages applied to municipal corporations.

In contrast, in *Newport*, there was no dispute in 1871 (and there is none today) about whether "punitive damages" under §1983 are punitive. It was therefore reasonable for this Court to conclude that if Congress had intended to subject municipalities to punitive damages under §1983, it would have said so.

3. This Court has never applied the "express-language" presumption to find an implied repeal of a statute's previous coverage.

In urging that the "express-language" presumption about Congress' intent be applied to the present case, petitioner is advocating something quite different than the Court did in *Newport*. In *Newport*, all parties agreed that §1983 itself applied to municipalities. The only issue was whether Congress, when it originally enacted §1983, had intended one form of available damages under the statute to apply to municipalities. In the present case, however, petitioner is arguing that the absence of a specific 1986 reference to municipalities effectuates the implied repeal of the entire FCA with respect to municipalities.

Using the "express-language" presumption for this drastic purpose is unprecedented and unwarranted. It is one thing to use the presumption to draw conclusions about what Congress intended about the remedial scope of an originally enacted statute. It is quite another thing to use the presumption to conclude that a subsequent Congress intended to wipe the entire underlying law off the books with respect to a huge category of defendants in the original Act. Such a use of the presumption is particularly

indefensible when the law in question – the 1986 Amendments – was clearly intended to effectuate an aggressive expansion of the FCA's coverage, and when nothing in the text or legislative history even hints that Congress wanted to repeal any part of the FCA.

C. Petitioner's Remaining Arguments For Its Interpretation Of Congress' 1986 Intent Have No Merit.

1. The arguments based on the FCA's Civil Investigative Demand provision and the Program Fraud Civil Remedies Act.

Petitioner argues that the CID provision of the FCA and the separate Program Fraud Civil Remedies Act, both enacted in 1986, show that Congress intended to immunize municipalities from the FCA. These arguments, derived from *Stevens*, have no merit in the context of municipal corporation defendants.

In *Stevens*, this Court observed that "the presence of . . . a definitional provision [including States] in §3733 [the CID provision] together with the absence of such a provision contained in §3729 . . . suggests that States are not 'persons' for purposes of *qui tam* liability under §3729." 529 U.S. at 784. Petitioner attempts to extend this reasoning to municipal corporations. Pet. Br., 28-30.

The argument is invalid, as is clear from the *Stevens* majority's response to a point made by the *Stevens* dissent. The dissent pointed out that §3733's definition of "person" covers "any natural person, partnership, corporation, association, or other legal entity." Hence, said the dissent, if the inclusion of certain items in §3733 implied their exclusion as a "person" under §3729, there would be absolutely no one left to be a "person" under §3729. 529 U.S. at 799 (Stevens, J., dissenting). The majority replied

that "[u]nlike States, all of those entities are presumptively *covered* by the term 'person.'" *Id.* at 784, n.14 (emphasis in the original). Similarly, as explained above, municipalities *were* presumptively included in the term "person" in 1863. In short, nothing about the CID provision supports the notion that Congress suddenly – and silently – decided to eliminate municipal corporations from the FCA's preexisting coverage.

Similarly, petitioner's argument about the Program Fraud Civil Remedies Act ("PFCRA"), 31 U.S.C. §3801 *et seq.*, is meritless. *Stevens* noted that the PFCRA does not cover States and that it would have been "most peculiar" for Congress to subject states to FCA liability while "exempt[ing] them from the relatively smaller damages provided under the PFCRA." 529 U.S. at 786. Petitioner argues that "[t]he same is true for local governments." Pet. Br., 33.

The argument has no merit. As respondent has already noted, *supra* at 31 n.6, the relevance of the 1986 Amendments to the FCA, or of the contemporaneously-passed PFCRA, is different than it was in *Stevens*. In *Stevens*, the Court concluded that the 1863 FCA had not included States in the term "person," and then considered whether Congress had intended in 1986 to *broaden* the FCA's coverage by adding the States to the meaning of the word "person." 529 U.S. at 782-87. Here, Congress in 1863 *did* intend to include municipal corporations in the term "person," and the issue is whether Congress in 1986 intended to *narrow* the FCA's coverage by *removing* municipal corporations from the meaning of the word "person." The absence of States in the 1986 PFCRA's coverage suggests that Congress did not mean, *sub silentio*, to expand the FCA's coverage that same year to States. But even if the PFCRA excludes municipal corporations –

a proposition for which petitioner provides no authority[8] – the absence of municipalities in the PFCRA's coverage does not suggest Congressional intent in 1986 to *abolish* a different statute's coverage of them, particularly given the legislative history of the 1986 Amendments showing the opposite intent.

Petitioner also argues that another subsection of the PFCRA, §3801(a)(9), employs the phrase "political subdivision of a State" in defining the term "statement." Petitioner says that this "signif[ies] that the 99th Congress was well aware of the language it needed to employ in order to bring local governments within the purview of a statute." Pet. Br., 32. But as discussed above, the issue is not what Congress had to do in 1986 to bring municipal governments within the FCA's coverage. They already were covered. Congress left them covered in 1986 simply by not changing the century-old use of the word "person" and by not adding a definition of "person" to the FCA.[9]

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[8] The PFCRA defines "person" as including corporations, §3801(a)(6), and as discussed in detail above, the term "corporation" has long covered both public and private corporations.

[9] Moreover, §3801(a)(9) is irrelevant to any issue of *who is covered*, either under the PFCRA or the FCA. Section 3801(a)(9) serves the different purpose of assuring that a person otherwise covered by the PFCRA can be held liable not only for lying directly to the federal government, but for lying to some other entity, such as a municipality, in connection with applying for money that will ultimately be paid by the federal government. Section 3801(a)(9) reads, in relevant part:

> "[S]tatement" means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made –
>
> * * *
>
> (B) with respect to (including relating to eligibility for) –
>
> (i) a contract with, or a bid or proposal for a contract with; or
>
> (ii) a grant, loan, or benefit from,

(Continued on following page)

For that reason, the PFCRA shows the opposite of what petitioner contends. The PFCRA shows that Congress knows how to define "person," and had Congress intended to narrow the previous meaning of "person" in the FCA, Congress could have added a restrictive definition of "person" in §3329. The fact that Congress did not do so supplies further evidence, if any were needed, that Congress had no intent to narrow the previous coverage of the FCA in any way, much less to abolish the FCA *sub silentio* as to municipal corporations.

2. The "policy" arguments.

Petitioner and its *amici* argue at length that it is undesirable for them to be subject to the FCA. Such arguments are to be expected. No one, municipal corporations included, likes to repay money that has been procured from the federal government by false statements. Abusers of federal funding particularly dislike the fact that the expanded whistleblower provisions of the amended FCA make it much more likely that they will be caught. But such attitudes are no reason to overrule Congress' choices in 1863 and 1986. Petitioner's "policy" arguments are appropriately addressed to Congress, not to this Court.

All of petitioner's policy arguments share a common characteristic: an *in terrorem* equation of treble damages with common-law punitive damages. This equation is

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an authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit, except that such term does not include any statement made in any return of tax imposed by the Internal Revenue Code of 1954.

unjustified. Notwithstanding *Stevens*' observation that treble damages are "essentially punitive in nature," there remain significant differences between treble damages and common-law punitive damages. As the court of appeals rightly held, these differences mitigate the concerns about common-law punitive damages that this Court addressed when it decided *Newport*.

Unlike common-law punitive damages, in which a jury's largely-unbounded discretion generally serves as the only upper limit on what can be "both unpredictable and, at times, substantial," 453 U.S. at 270-71, FCA treble damages follow automatically from proof of the amount of the false claim. They therefore have a specific upper limit that is rationally related to the federal government's loss. *Chandler*, 277 F.3d at 978; *see United States v. Barnett*, 10 F.3d 1553, 1560 (11th Cir.), *cert. denied*, 513 U.S. 816 (1994) (civil penalty plus treble damages under the FCA has a rational relation to the government's loss).

Treble damages are not only rationally related to the government's loss, but may in fact undercompensate the government. For example, in the present case, the federal government paid petitioner more than $5,000,000.00 over a six-year period beginning in 1989. By the end of 2002, prejudgment interest on that amount – which under the FCA is recoverable only indirectly, as part of treble damages – will exceed $6,000,000.00, and it will continue to grow. Moreover, the relator will be entitled to a substantial percentage of any recovery under the expanded-percentage provision of the 1986 Amendments. §3729(a). Thus, without the treble-damage provision, there would be little prospect of the federal government fully recovering its losses from petitioner's conduct.

As this analysis shows, in contrast to the windfall recovery that common-law punitive damages provide to otherwise fully-compensated individual plaintiffs, the bulk of any recovery under the FCA goes to the federal government to indemnify it for the losses associated with the fraud and compensate for the costs of recovery. And unlike

§1983 punitive damages where both the compensatory and punitive damages come from the tax base, "[u]nder the FCA, at least a portion of the recovery will come from the monies taken by the municipality through its false claims." *Chandler*, 277 F.2d at 978.

In light of these considerations, the specific "policy" arguments advanced by petitioner are merely an unjustifiable disagreement with Congress' legitimate choice of means to enforce honesty among its municipal grantees.

The "special relationship" argument. Petitioner argues that because the relationship between the United States and local governments "is necessarily one of co-dependence and cooperation," local governments that make false claims should not be held liable for treble damages under the FCA. According to petitioner, this immunity is essential because relators may aggressively bring *qui tam* actions against local governments that the federal government might choose not to bring. Such actions, says petitioner, may have the effect of disrupting local services or, even worse, "leave local governments with the equally unpalatable choices of rejecting federal funds or, if sued, either being coerced into settlement . . . or incurring the cost of litigation and risking a substantial adverse judgment, which, of course, would be shouldered by the local taxpayers." Pet. Br., 34.

These hyperbolic arguments are unconvincing. First, municipal corporations, like private corporations, can avoid such dilemmas by not making false claims against the federal government. To deter such false claims, Congress deliberately made their consequences expensive. To put it bluntly, treble damages give a municipality a strong incentive to prevent and root out fraud.

Second, petitioner's concern about renegade relators, "motivated primarily by prospects of monetary reward rather than the public good," with interests that are "incompatible with the interests of the United States," Pet. Br., 33-34, is nothing but a quarrel with Congress' choice of means in the FCA. Congress *wants* aggressive relators.

Congress recognized that the federal government's resources to detect and prosecute fraud have been overwhelmed by the vast scale of federal assistance and the startling prevalence of fraud. Thus, when Congress expanded the rewards for successful relators in 1986, it aimed to create a broad pool of "private inspectors general" who would do what the federal government could not do by itself.

Nonetheless, the FCA places checks on overzealous relators. The federal government remains integral to the *qui tam* lawsuit even when it refrains from intervening. At the end of its investigation, the federal government may move to dismiss the lawsuit, with or without the relator's approval, S.Rep. 99-345 at 26; §3730(c)(1). The government can stay discovery in the relator's suit if it interferes with a government investigation, §3730(c)(4). It can insist that the relator serve it with copies of all pleadings and obtain its approval for any settlement; and it routinely files *amicus* briefs on issues it believes important. And as the court of appeals pointed out, the 1986 Amendments provide ample ammunition to deter frivolous suits:

> If the basis for the suit was information that was already available, a district court may limit a relator's recovery to 10 percent of the award, *id.* §3730(d)(1), or bar the suit entirely unless the Attorney General prosecutes the case, *id.* §3730(d)(4)(A). If the relator himself planned or was guilty of violations of the FCA, the court may dismiss his suit. *Id.* §3730(d)(3). If the relator proceeds with the suit himself and the court finds that the suit was "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment," the court may award the defendant attorneys' fees and expenses. *Id.* §3730(d)(4). . . . These changes gave courts more discretion to regulate *qui tam* suits and to weed out illegitimate actions.

Chandler, 277 F.3d at 976.

Third, the so-called special relationship between "the United States and units of local government" based upon "co-dependence and cooperation," proves too much. The federal government relies heavily on a "cooperative relationship" with thousands of *private* corporations with whom it contracts directly to deliver services to residents of local governments. As a practical matter, the relationship between the federal government and municipal corporations differs little from the relationship between the federal government and the myriad of private corporations – corporations with whom municipalities directly compete for federal funds. For example, private hospitals and schools routinely compete with public hospitals and schools for research grants or Medicare and Medicaid dollars. Under petitioner's theory, if a private hospital falsifies its results or misdirects funds, it is liable for treble damages and penalties, above and beyond whatever "other remedies" the United States has at its disposal. But if Cook County Hospital engages in such misbehavior, it is subject (in petitioner's view) to no FCA liability whatsoever, and may be required to disgorge only in the unlikely event that it is specifically targeted by a federal investigation.

Fourth, the "innocent taxpayers" argument carries little force, and is counterbalanced by the great benefit to taxpayers that results from the healthy fear of FCA suits that the current regime imposes on municipal corporations. In any FCA case, the ultimate financial burden of a judgment or settlement will normally be borne by innocent bystanders. When a for-profit corporation is found liable, the burden is ultimately borne by shareholders who doubtless had no intent whatsoever to defraud the government. When a private not-for-profit corporation like the University of Chicago Hospitals is found liable under the FCA, the burden is borne by its consumers and monitors of medical services. Frequently, if not usually, the financial burden on such innocent private parties will be harder for

them to bear than it will be for taxpayers in the case of municipal defendants.

In any case, Congress has determined any costs of a treble-damages scheme to be offset by the benefit to the public from making sure that federal funds actually yield the expected results. It is hard to see how Cook County taxpayers – who also pay federal taxes, as well as the costs associated with providing services to children born to drug-addicted mothers – benefit from Cook County's proposed immunity, or why the federal courts should adopt such a position in the face of clear congressional intent to the contrary.

The "other remedies" argument. To support its plea for implied repeal of the FCA as to municipal corporations, petitioner cites the fact that the United States has other remedies to combat fraud by local governments, "such as administrative proceedings, proceedings to suspend or debar a local government that is eligible to enter into contracts with the federal government, or actions in fraud, unjust enrichment and breach of contract." Pet. Br., 37. This fact is no basis for overriding the decision of Congress to include local governments within the reach of the FCA. Those other remedies are available against all potential FCA defendants – a fact that does not restrict the reach of the FCA in any way.

Moreover, as the presence of the United States *amicus curiae* in support of respondent attests, the Justice Department and the various federal agencies lack the resources to monitor the billions of federal dollars flowing to local governments in the form of grants, programs, and contracts.

The FCA, with its *qui tam* provision, is the "Government's primary litigative tool for combating fraud." S.Rep. 99-345, at 2. Any remedial scheme has costs, and no scheme will please everyone. But the treble-damages scheme of the amended FCA produces obvious and substantial benefits in addressing a major problem which – as the present case shows – municipal corporations are very

much a part of. The decision to impose a treble-damages scheme of compensation on all defendants – whether individuals, private corporations, or municipal corporations – was Congress' to make.

CONCLUSION

The decision of the court of appeals should be affirmed.

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No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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ARGUMENT

In 1863, there was no legal presumption that "person" included local governments for purposes of statutory construction. Moreover, because local governments were not recipients of federal funding, there was no need for Congress to include them as "persons" when enacting the 1863 Act. Indeed, by including criminal provisions in the 1863 Act, Congress necessarily excluded local governments from its liability provisions. Understandably, there are no reported cases of local governments being sued prior to the FCA's 1986 amendments. When, in 1986, Congress amended the FCA to add punitive damages, local governments still were not "persons." *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000) ("person" has not changed since the 1863 Act). In any event, Congress' imposition of mandatory punitive damages, without a clear expression that such damages were to apply to local governments, effectively immunized local governments from FCA liability. The policy considerations for not imposing punitive damages on local governments are obvious—innocent citizens bear the brunt of such damages either through an increase in taxes or a decrease in needed services. The Court's reasoning in *Stevens* that "various features of the FCA, both as originally enacted and as amended," indicate that States are not subject to the FCA, *id.* at 787, compels a like conclusion that local governments are not subject to the FCA.

I. THERE IS NO EVIDENCE THAT THE 1863 ACT SUBJECTED LOCAL GOVERNMENTS TO LIABILITY.

1. Respondent, Relator, urges the statutory construction of the 1863 Act adopted by the court of appeals, Pet. App. 8a, in which a presumption is applied to the word "person," as used in Congressional enactments, to include local governments. "Presumption" is a potent concept. Neither a

"non-controversial proposition," Resp. Br., 13, 20, nor a "contemporaneous understanding" of the suability of municipal corporations, U.S. Br., 12 n.4, translates into a "presumption."

Relator cites a number of nineteenth century cases in which local governmental bodies were sued in contract or tort, none of which, with the exception of *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1869), interprets the meaning of "person" as used by Congress. Therefore, those cases shed no light on the issue before the Court, whether Congress, by using the term "person," subjected local governments to liability under the 1863 Act.

The authorities cited by Relator demonstrate no more than that the law was still evolving prior to the Court's decision in *Cowles*. *See, e.g., Monell v. Department of Soc. Serv. of City of New York*, 436 U.S. 586, 673 (1978) (noting that "*Board of Comm'rs v. Aspinwall*, 24 How. 376 (1861), [was] the first of many cases upholding the power of federal courts to enforce the Contract Clause against municipalities"). By 1863, "the state courts did not speak with a single voice with regard to the tort liability of municipal corporations . . . [and] no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons." *Monell*, 436 U.S. at 720-21 (Rehnquist, J., dissenting); *see also Owen v. City of Independence, Mo.*, 445 U.S. 622, 639 (1980) (noting that, although, in 1871, "[l]ocal governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations, . . . a municipality was not subject to suit for all manner of tortious conduct").[1]

[1] Relator argues that nothing happened between 1863 and the *Cowles* decision in 1869 to lead to the extension of the meaning of "person" to include local governments. Resp. Br., 12. Actually, a great deal happened. The Civil War ended, and the Reconstruction period began. The Thirteenth, Fourteenth, and Fifteenth Amendments became law between 1865 and 1870. To enforce the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1871, which subjected local governments to liability. *See Monell*, 436 U.S. at 665, 685-86.

In contrast, by the time Congress enacted the Civil Rights Act of 1871, local governments were considered "persons" for purposes of statutory construction both under the Court's 1869 decision in *Cowles* and by Congress' 1871 enactment of the Dictionary Act. Act of Feb. 25, 1871, § 2, 16 Stat. 431. Yet, in holding that local governments were subject to liability under Section 1983 of the Civil Rights Act, the Court in *Monell* did not rely solely on a "presumption" that local governments were "persons" in 1871. Rather, the Court also considered the legislative history for indications of Congressional intent, the general treatment of municipal corporations in 1871, and the Dictionary Act. *See Monell*, 436 U.S. at 686-89. As Cook County explained in its initial brief, Pet. Br., 13-19, applying those same considerations to the 1863 Act leads to the conclusion that the term "person" did not include local governments. *See United States v. Erie County Med. Ctr.*, 02-CV-0305 E(Sr), 2002 U.S. Dist. LEXIS 22673, at *17 (W.D.N.Y. Oct. 30, 2002).

2. The United States argues that local governments "are as capable as natural persons or commercial corporations of submitting false claims for payment to the federal government" and thereby threaten the federal fisc. U.S. Br., 15. Notably, the United States nowhere explains under what circumstances local governments could have done so in 1863, or, for that matter, whether local governments were receiving any money from the federal government in 1863.

Relator equates municipal corporations with private corporations, which were presumptively included within the term "person" by 1863. Resp. Br., 15-22. In a broad sense, the term "corporation" applies to any body politic and corporate, including even the United States. *See Ngiraingas v. Sanchez*,

495 U.S. 182, 202 and n.8 (1990) (Brennan, J., dissenting) (citations omitted). However, Congress does not always use the term in its broadest meaning. Generally, statutes make clear, either through express language or clear implication, whether they refer to municipal or other kinds of corporations, or to both.[2] When a statute is not specific as to Congress' intent regarding the scope of the term "corporation," the Court has looked to other factors to determine the legislature's intent. *See, e.g., City of Lincoln v. Ricketts*, 297 U.S. 373, 374, 376-77 (1936) (examining Bankruptcy Act for legislative intent before concluding that "corporation" was being used in a broad sense to include municipal corporations); *contrast Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-09 (1993) (despite inclusion of "association" in Dictionary Act's definition of "person," Court found that certain features of *in forma pauperis* statute suggested that Congress only intended for natural persons to proceed under that statute). In neither *Cowles* nor *Monell* did the Court equate public corporations with private corporations as early as 1863. *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262 (1981) (distinguishing between municipal and private corporations) (citing *Hunt v. City of Boonville*, 65 Mo. 620, 625 (1877)).

In the early and mid-nineteenth century, the law regarding the corporate structure of local governments was evolving differently in the different states, with some local governments considered municipal corporations and others quasi-corporations. *See* Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U.L. Rev. 369, 372, 392-410 (1985). The liability

[2] Neither Relator nor her *amici curiae* disputes that many statutes, such as those listed in Pet. Br., 26-27, Airport Proprietors Br., 12-13, and Orange County Br., 7 n.4, demonstrate that Congress makes its intention clear when it wishes to include local governments within the purview of a statute.

of municipal corporations, "made such by acceptance of a willage or city charter," was greater than that of involuntary quasi-corporations, "known as counties, towns, school-districts, and especially the townships of New England." *See Barnes v. District of Columbia*, 91 U.S. 540, 552 (1875).[3] Moreover, in the mid-nineteenth century, Congress was aware that even private corporations were not treated as "persons" for all purposes. *See Monell*, 436 U.S. at 720 (Rehnquist, J., dissenting) (noting that while private corporations were "citizens" for purposes of Article III, they were not for purposes of the Privileges and Immunities Clause) (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869)).

Both Relator and the United States argue that *Cowles* did not change the law because the question was "non-controversial," Resp. Br., 20, and because *Cowles* did not overrule a prior understanding. U.S. Br., 11. The pre-*Cowles* cases upon which Relator and the United States rely do nothing more than show what the law was for certain purposes in certain states, which is insufficient to establish a "presumption" that the word "person" included local governments for purposes of Congressional enactments as early as 1863. Indeed, it was not until the *Cowles* decision in 1869 that the Court first held that local governments could be treated as natural persons. *See Erie County*, 2002 U.S. Dist. LEXIS 22673, at *13.

The United States, U.S. Br., 13, points to the Court's comment in *Stevens* that corporations were "presumptively

[3] Relator hastily concludes that Cook County was a "full-blooded 'corporation' as of 1863." Resp. Br., 17 n.3. In fact, the distinction between municipal corporations and quasi-corporations existed in Illinois, and, as late as 1924, the Illinois Supreme Court explained that, in contrast to municipal corporations, which existed at the request of the people, counties were involuntary quasi-municipal corporations, "rank[ed] low in the scale or grade of corporate existence." *County of Cook v. City of Chicago*, 311 Ill. 234, 239-41 (1924).

covered by the term 'person.'" *Stevens*, 529 U.S. at 782 (emphasis in original) (citing 1 U.S.C. § 1). Because the presumption that municipal corporations are embraced in the word "person" for purposes of statutory construction did not exist in 1863, *see Erie County*, 2002 U.S. Dist. LEXIS 22673, at *17 n.19, the Court's reference in *Stevens* to "corporations" in the Dictionary Act is limited to private corporations. Indeed, quoting *United States v. Bornstein* for the proposition that "the FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War,'" the Court in *Stevens* added "private" to make clear that private corporations, not public ones, were targeted by Congress in the 1863 Act. *See Stevens*, 529 U.S. at 781 (quoting *Bornstein*, 423 U.S. 303, 309 (1976)). Moreover, the 1863 Act itself specifically referenced an "officer or agent of any banking or other commercial corporation, and . . . member of any mercantile or trading firm," barring such individuals from employment by the United States "for the transaction of business with such corporation or firm." Act of Mar. 2, 1863, ch. 67, § 8, 12 Stat. 696, 698-99. Pet. Br. App. 36a. Clearly, Congress itself made a distinction in the 1863 Act between municipal and commercial corporations.

There was no presumption by 1863 that local governments were included in the term "person" in Congressional enactments or that all local governments had a uniform corporate identity that equated with a private corporation. Thus, the term "person" in the 1863 Act did not presumptively include local governments.

3. Even if the Court finds that the term "person" presumptively included local governments in 1863, the mandatory criminal penalties imposed under the 1863 Act establish that Congress did not intend that presumption to apply to the 1863 Act. Relator and the United States contend that this argument proves too much, noting that, just as a local

government cannot be imprisoned, neither can a private corporation. Resp. Br., 23; U.S. Br., 13. However, it is the fact that a local government cannot be subject to any criminal penalty that distinguishes it from a private corporation. Thus, contrary to Relator's and the United States' assertions, the County's interpretation of the 1863 Act does not exclude private corporations from liability.

Federal crimes are created solely by statute, as opposed to common law. *See United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812). The 1863 Act "made it a criminal offense for any person, whether a civilian or a member of the military services," to present upon the United States any claim for payment "'knowing such claim to be false, fictitious or fraudulent.'" *Hubbard v. United States*, 514 U.S. 695, 704 (1995) (quoting 1863 Act). Among other things, Section 1 of the 1863 Act provided that any person who "shall steal, embezzle, or knowingly and willfully misappropriate" shall be subject to criminal punishment. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 697. Pet. Br. App. 33a. Not only did the 1863 Act impose an actual knowledge of fraud and/or willfulness element, in other parts of Section 1, it also imposed an "intent to defraud" and "intent to cheat" element. *Id.* at 696-97; Pet. Br. App., 33a; *see also United States v. Jennison*, 26 F. Cas. 608, 610 (Cir. Ct., D. Kan. 1874) (No. 15475) (judge charging jury that under 1863 Act they must find that defendant intended to defraud government); *Kurzrok v. United States*, 1 F.2d 209, 211 (8th Cir. 1924) (rejecting defendant's contention that there was insufficient evidence upon which jury could have found that defendant "intended to defraud the United States" in violation of FCA); *United States v. Griswold*, 24 F. 361, 365 (D. Or. 1885), *aff'd* 30 F. 762 (Cir. Or. 1887) ("A forfeiture cannot occur under section 5438, Rev. St. [codification of criminal provision of 1863 Act], without the party incurring the same being guilty of both fraudulent intent and conduct."); *United States v. TDC Mgt. Corp., Inc.*, 24 F.3d 292, 297

(D.C. Cir. 1994) (intent to deceive is element of fraud under pre-1986 version of FCA).[4] As local governments were not thought capable of forming criminal intent, the word "person" in the 1863 Act cannot sensibly be interpreted to include local governments. *See City of Newport*, 453 U.S. at 264 n.23 (quoting G. Field, Law of Damages § 80 (1876)) ("'[Municipal corporations] cannot . . . be supposed capable of doing a criminal act.'").[5]

While the 1863 Act originally provided both criminal and civil sanctions in the same statute, those provisions were subsequently bifurcated. *Rainwater v. United States*, 356 U.S. 590, 592 n.8 (1958). In the Revised Statutes of 1878, the civil sanctions were codified as Sections 3490-3494 and the criminal sanctions as Section 5438. *Id.*[6] The Court has narrowly interpreted Section 5438 of the Revised Statutes, which was largely a re-enactment and codification of Section 1 of the 1863 Act. *See United States ex rel. Marcus v.*

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[4] In 1986, Congress amended the FCA so that "proof of specific intent to defraud" was no longer required, making it easier for the federal government and relators to prevail. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 976 (7th Cir. 2002) (citing 31 U.S.C. § 3729(b)). Pet. App. 12a-13a.

[5] Even RICO's expansive reach, Resp. Br., 25, does not extend to local governments, which cannot form the requisite intent. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) (civil RICO claim against public hospital fails "because government entities are incapable of forming a malicious intent," an element of the predicate criminal act); *Albanese v. City Fed. Sav. and Loan Ass'n*, 710 F. Supp. 563, 567 (D.N.J. 1989) (township cannot form criminal intent to commit predicate acts and thus cannot be held liable under civil RICO statute).

[6] Section 5438, titled Crimes, made certain acts to defraud the United States crimes punishable by imprisonment or fine, while Section 3490 made the violation of Section 5438 subject to forfeitures of $2,000 per false claim and double damages. *Rainwater*, 356 U.S. at 592 n.8; *see also Bornstein*, 423 U.S. at 306.

Hess, 317 U.S. 537, 542 (1943) ("§ 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with § 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included"); *United States v. McNinch*, 356 U.S. 595, 598 (1958) (noting that in construing Section 5438 it is "actually construing the provisions of a criminal statute" and that "[s]uch provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible [of] numerous definitions"); *see also Rainwater*, 356 U.S. at 592-93.

This same reasoning would not have excluded private corporations from liability under the 1863 Act. While both local governments and private corporations cannot be imprisoned, a private corporation, unlike a local government, can be held criminally liable. *See, e.g., New York Central R.R. v. United States*, 212 U.S. 481, 492-94 (1909). Indeed, as the United States correctly points out, a corporation was held to be a person subject to a penal statute as early as 1826. U.S. Br., 10 n.3 (citing *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412-13 (1826)). Moreover, Section 8 of the 1863 Act provided that "no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm . . . shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm." Act of Mar. 2, 1863, ch. 67, § 8, 12 Stat. 696, 698-99. Pet. Br. App. 36a. By its express terms, a violation of Section 8 occurred simply by virtue of the conflict of interest with no showing that the corporation submitted a false claim to the United States. *Cf. United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549-50 (1961) ("the statute [restatement of Section 8 of 1863 Act] is more concerned with what might have happened in a given situation than with what actually happened"). That Congress would have prohibited conflicts of interest in

transactions between commercial corporations and the United States but not have prohibited commercial corporations from submitting false claims defies common sense.

Thus, even if the Court finds that the term "person" presumptively included local governments in 1863, the criminal context in which the term was used in the 1863 Act overcomes that presumption.

4. Recognizing that "person" has remained in the FCA unchanged since 1863, *see Stevens,* 529 U.S. at 783 n.12, the United States cites the FCA's 1982 amendments for the proposition that they "reinforce" the conclusion that Congress, in 1863, intended local governments to be subject to the 1863 Act. The United States bases this proposition on *Monell*'s holding that local governments were persons under Section 1983 as well as the Court's holdings that the FCA covered all forms of fraud against the United States and that the damages available at that time were compensatory. U.S. Br., 15-16. The United States reads too much into the 1982 amendments.

First, *Monell*'s holding is limited to Section 1983, enacted eight years after the 1863 Act. Second, while the 1863 Act was intended to cover all types of fraud, it was not "intended to cover all types of *fraudsters.*" *See Stevens,* 529 U.S. at 781 n.10 (emphasis in original). Third, the Court's holdings regarding the FCA's double damages are not controlling because those damages simply provided the federal government with full compensation, not punitive damages. Finally, as the Court in *Stevens* noted, "[i]n 1982, Congress made a housekeeping change" which resulted in the incorporation of "the term of art 'member of an armed force' throughout Title 10 of the United States Code." *Stevens,* 529 U.S. at 782. Therefore, the 1982 amendments neither create a presumption nor reinforce that local governments were included as "persons" under the 1863 Act.

If anything, by not explicitly expressing an intent to subject local governments to liability, the amendments to the FCA in 1982, as well as in 1986, in fact, reinforce that "person" in the 1863 Act never included local governments. Indeed, Congress' imposition of mandatory punitive damages in 1986, from which local governments are immune, further confirms that the term "person" in the FCA does not include local governments. *See Erie County*, 2002 U.S. Dist. LEXIS 22673, at *20-21.

5. A more compelling indication that Congress subjected local governments to liability under the 1863 Act would be a history of lawsuits brought against local governments. However, none exists prior to the 1986 amendments. Neither of the two matters that Relator cites, Resp. Br., 32, establishes that local governments were sued, let alone held liable, under the FCA prior to the enactment of the 1986 amendments. *United States v. Bd. of Educ. of City of Union City* was a suit for violations of the FCA, common law fraud, breach of contract, unjust enrichment, and conversion brought against multiple defendants, including a number of individuals who had been convicted for the same conduct. Civil Action No. 83-2651, 1985 U.S. Dist. LEXIS 14917 (D.N.J. 1985). It is not clear under which cause of action the Board of Education was being sued; however, insofar as the Board of Education, as a third-party plaintiff, attempted to join in the United States' summary judgment motion on the FCA claims against the individual defendants, *id.*, it seems extremely unlikely that the United States was pursuing an FCA claim against the Board of Education. *United States v. Escondido Union Sch. Dist.,* No. 78-0845-S (S.D. Cal.), has no opinion from which one can glean the cause of action brought against the defendant School District or whether the question regarding a local government's status as a "person" under the FCA was raised. Notably, the United States has not commented on either of these cases.

II. THERE IS NO EVIDENCE THAT CONGRESS INTENDED TO IMPOSE THE FCA'S PUNITIVE DAMAGES ON LOCAL GOVERNMENTS.

The Court presumes "that Congress expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). Therefore, when, in 1986, Congress increased the FCA's civil remedy from double to treble damages and the fines from $2,000 to between $5,000 and $10,000, it knew that the double damages of the FCA were not punitive. *Marcus*, 317 U.S. at 550; *Bornstein*, 423 U.S. at 531 n.11. Congress also knew that treble damages, like those in the antitrust laws, would have been punitive. *Stevens*, 529 U.S. at 785-86 (citing *Marcus*, 317 U.S. at 550); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct").[7] Congress also knew that the Court recognized a long-standing immunity from the imposition of punitive damages against governmental entities and that Congress must expressly manifest its intention to abrogate the immunity. *City of Newport*, 453 U.S.

[7] That treble damages can be assessed against local governments under the antitrust laws does not compel a different result. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 n.16 (1978). In *City of Lafayette*, the Court determined that the antitrust laws were drafted with the purpose of reaching all commercial activity, including a municipality's commercial activity. *Id.* at 408 ("If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established."). "The [FCA] and the antitrust laws are not analogous in this regard" because the FCA does not have "the same broad scope as the antitrust laws." *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 494 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002).

at 259, 260 n.21, 263. Finally, Congress knew that the United States had remedies other than the FCA to recover damages from local governments. Thus, Congress was aware of the consequence of trebling the damages with no indication of an intent to impose the mandatory damages on local governments.

1. Relator downplays the punitive nature of the FCA's mandatory treble damages plus fines plus relator's attorneys fees, arguing that the increase "was necessary to assure full compensation to the federal government" since the percentage paid to relators was increased. Resp. Br., 39. However, unlike the double damages at issue in *Marcus*, 317 U.S. 537, or *Bornstein*, 423 U.S. 303, under the 1986 amendments, the federal government's share of the damages far exceeds the amount necessary to make it whole. Even though a relator may receive up to 30% of both the treble damages and fines, the federal government receives in excess of double the damages. Where the United States brings an action itself, it receives the full treble damages plus fines. The rationales of *Marcus* and *Bornstein*, thus, do not justify the windfall to the United States under the current mandatory treble damages.

Relator also argues that Congress intended the treble damages to be compensatory, but "ultimately settled on the simpler scheme of treble damages." Resp. Br., 38. Simpler or not, the FCA's damages are punitive. *See Stevens*, 529 U.S. at 784-85. "[I]t is the function of the courts and not the Legislature . . . to say what an enacted statute means." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). For example, it is safe to assume that Congress always intends to enact a constitutional statute, but that well-meaninged intent does not prohibit the Court from holding that an enactment is unconstitutional. Likewise, even if Congress considered the treble damages scheme in the 1986 amendments to be compensatory, the Court in *Stevens* has determined otherwise.

Relator's distinction between "common-law punitive damages" and treble damages that are "essentially punitive in nature," Resp. Br., 44-45, leads nowhere. "Punitive damages, by definition, are damages in excess of those necessary to provide recompense." Brief for the United States as *Amicus Curiae* at *16, *Barnes v. Gorman* (On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit) (No. 01-682). Whether punitive damages are imposed against a local government by a jury award or by a mandatory punitive damages scheme, the result is the same: they punish "only the taxpayers, who took no part in the commission of the tort . . . and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *City of Newport*, 453 U.S. at 267.

2. By using terms such as "sub silentio," "repeal," Resp. Br., 32, 33, "oust," U.S. Br., 17, and "remove," K&R Br., 8,[8] Relator and her *amici curiae* ask the Court to invert the well-established standard for the imposition of punitive damages on local governments from one requiring an explicit indication of abrogation from Congress to one requiring a mere inference. *See, e.g., Barnes v. Gorman*, 122 S. Ct. 2097, 2103 (2002) (Stevens, J., concurring) ("absent clear congressional intent to the contrary, municipalities are not subject to punitive damages") (citing *City of Newport*, 453 U.S. 247); *Owen*, 445 U.S. at 704 ("immunities 'well-grounded in history and reason' [were not] abrogated 'by covert inclusion in the general language'") (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). To begin with, since local governments were not "persons" under the 1863 Act, there was nothing in

[8] The Taxpayers Against Fraud further argue that the 1986 amendments changed the meaning of "person" to broaden it and that the FCA's treble damages are not punitive. Taxpayers Br., 9, 12-23. Those arguments run directly counter to the Court's conclusions in *Stevens*. *Stevens*, 529 U.S. at 783 n.12, 784-85.

1986 to "oust" or "repeal." Moreover, the inferences that Relator and her *amici curiae* have pressed do not indicate any Congressional intent to impose punitive damages on local governments.

The Senate Committee Report's citation to *Smith v. United States*, 287 F.2d 299 (1961), Resp. Br., 32, does not constitute a clear expression of Congressional intent to impose punitive damages on local governments. In *Smith*, the executive director of a governmental housing project was convicted under the FCA. *Id.* at 300. Not only does *Smith* have nothing to do with liability of local governments under the FCA, the Senate Report did not cite *Smith* for Relator's proposition that Congress understood that local governments could violate the FCA. S. Rep. No. 99-345, at 18-19, *reprinted in* 1986 U.S.C.C.A.N. at 5283-84.

Nor does Congress' 1985 increase of damages for false claims involving contracts with the Department of Defense infer a Congressional intent to impose punitive damages on local governments. U.S. Br., 25-26. In 1985, Congress decided that some fraudsters could be held liable for double damages under the FCA and others for treble damages under the Department of Defense Authorization Act. Also, in 1985, Congress first proposed to add mandatory treble damages to the FCA for all fraud claims. 131 Cong. Rec. 22,322 (1985). Thus, Congress' adoption of a treble damages scheme in the FCA to comport with the same scheme under the Department of Defense Authorization Act, *see* S. Rep. No. 99-345, at 17, *reprinted in* 1986 U.S.C.C.A.N. at 5282, is not an explicit indication of Congressional intent to impose the FCA's punitive damages on local governments.

The United States' argument that, given "Congress's overriding intent to strengthen and expand" the FCA, it is "unlikely" that Congress would have exempted local governments from the 1986 amendments, U.S. Br., 19, is particularly curious in light of the position it took earlier this year

in another case before the Court. There, the United States, as *amicus curiae*, argued: "A court should not impute to Congress an intent to allow a punitive damages remedy absent a clear congressional directive," and even when "punitive damages are found to be available in certain circumstances, this Court has declined to recognize a punitive damages remedy against municipalities." Brief for the United States as *Amicus Curiae* at *7, *17, *Barnes v. Gorman* (On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit) (No. 01-682). In that case, the United States correctly stated: "the Court in *Fact Concerts* did not presume that punitive damages were available against municipalities unless Congress said otherwise, . . . Instead, in *Fact Concerts*, the Court first looked to whether there was any evidence that in enacting Section 1983, Congress had intended to override the 'common-law tradition' that punitive damages were not available against a municipality." *Id.* at *17 (citing *City of Newport*, 453 U.S. at 261). The United States' position in *Barnes v. Gorman* that "the proper presumption in the absence of clear Congressional guidance is against inference of a punitive damages remedy," *id.* at *11 (heading for its first argument), is directly applicable to this case. Without a clear indication from Congress that the FCA's punitive damages are to be imposed on local governments, the federal government is left to resort to more traditional causes of action against local governments.

As for the whistleblower provision, it is not at all implausible that Congress may have subjected local governments to liability for retaliation but not for submitting a false claim. Relator ignores the range of other actions that could be taken by the United States against a local government in response to disclosures of fraud, such as threatening the withdrawal of federal funding, which can be the death knell of a program. Thus, that local governments may be subject to retaliation liability under 31 U.S.C. § 3730(h) does not lead to the

inexorable conclusion that they may also be subject to liability for submitting a false claim.

Relator's *amicus curiae*, K&R Limited Partnership, cites a line of cases holding that an employee must show a distinct possibility that a viable FCA suit can be brought against her employer to state a claim for retaliation under Section 3730(h). K&R Br. 19. However, the only courts to have considered whether a local government is an "employer" under Section 3730(h) held that a local government could be sued for retaliating against its employee, despite the fact that it cannot be sued for submitting a false claim. In *United States ex. rel. Satalich v. Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Ca. 2001), the court, after observing that the whistleblower provision applied to "any" employer, explained:

> While it may seem unlikely that a non-target employer would engage in retaliatory conduct, this case demonstrates the propriety of interpreting section 3730(h) literally, and permitting the action to go forward. Specifically, this case presents a circumstance where an employer without FCA liability could be in cahoots with other non-municipal entities that are potentially liable, and for that reason may be motivated to silence a whistleblower. Moreover, the remedies provision of section 3730(h) does not impose punitive damages. Thus, the Court is not confronted with the considerations of history and policy which support municipal immunity from section 3729 liability. Given the obvious policy considerations that underlie the enactment of section 3730(h), the Court concludes that Plaintiff should be

> permitted to maintain this action, irrespective of whether the City bears any potential liability under section 3729.

Id. at 1107-08; *see also Erie County*, 2002 U.S. Dist. LEXIS 22673, at *13.[9] As Cook County argued in its initial brief, Pet. Br., 30, the Senate Committee Report's definition of "employer" in the whistle-blower provision, upon which Relator places great reliance, Resp. Br., 31, is too thin a reed to support a finding that Congress abrogated the common-law local governmental immunity from punitive damages. *Cf. United States ex rel. Long v. SCS Business and Technical Inst.*, 999 F. Supp. 78, 93 (D.D.C. 1998), *rev'd on other grounds*, 173 F.3d 890 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000) ("Congress' intent to protect whistleblowers does not extend to whistleblowers whose employer is a state because Congress did not clearly state such intention in the statute, even if the legislative history suggests such an intention.").

Neither Cook County nor its *amici curiae* have suggested that local governments cannot be held accountable for fraud upon the United States. The FCA, however, with its punitive damages, is not the appropriate remedy for fraud committed by a local government in its use of federal funds. Nothing about the real punishment inflicted by the FCA is "hyperbolic." Resp. Br., 46. Funds used to satisfy a punitive damages judgment against a local government necessarily means less money to spend on schools, hospitals, airports, roads, and numerous other programs and services provided by local governments. Thus, the burden of the FCA's punitive damages is felt by innocent people throughout this country, from school children to the medically indigent to the users of

[9] As in *Satalich*, Relator, here, alleges that Cook County was in cahoots with its co-defendant, the Hektoen Institute for Medical Research ("Hektoen"), a suable entity under the FCA. Because Hektoen employed Relator, her retaliatory discharge claim against Cook County was dismissed. Pet. App. 48a.

public airports, to name but a few. These innocent victims of the FCA's punitive damages have no means of "avoid[ing] such dilemmas." Resp. Br., 46. While Congress has the power to impose punitive damages on local governments, the Court has always required a clear indication of Congressional intent. No clear indication exists anywhere in the history of the FCA of a Congressional intent to subject local governments to liability under the FCA, much less punitive damages.

Consistent with the Court's analyses in *Stevens* and *City of Newport,* the Court should reverse the judgment of the court of appeals.

CONCLUSION

For the reasons set forth above and in Petitioner's Brief, as well as for the reasons set forth in the briefs filed by the *amici curiae* in support of the Petitioner, Cook County, Illinois, the court of appeals' decision should be reversed.

Respectfully submitted,

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No. 01-1572

In the Supreme Court of the United States

COOK COUNTY, ILLINOIS, PETITIONER

v.

UNITED STATES EX REL. JANET CHANDLER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether local government entities are subject to *qui tam* actions under the False Claims Act, 31 U.S.C. 3729.

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In the Supreme Court of the United States

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v.

UNITED STATES EX REL. JANET CHANDLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case involves a *qui tam* suit against a county under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.* The question presented is whether a county or other unit of local government is a "person" subject to potential liability under the Act, see 31 U.S.C. 3729(a). Because the FCA is the primary mechanism by which the federal government recoups losses suffered through fraud, and because the government receives the bulk of any award obtained through a *qui tam* action, the United States has an interest in the proper construction of the Act.

STATEMENT

1. The FCA "is used as the primary vehicle by the Government for recouping losses suffered through fraud." H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986) (*House Report*). The FCA was enacted in 1863 (see Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863 Act)), and "was originally aimed principally at stopping the massive frauds perpetrated by large

contractors during the Civil War," *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976). The 1863 Act provided that "any person not in the military" who submitted a false or fraudulent claim for payment by the United States government would "forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained." § 3, 12 Stat. 698.[1]

The 1863 Act further provided that a suit to recover the statutory remedies "may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States." § 4, 12 Stat. 698. If the suit resulted in a monetary recovery, the award was divided evenly between the private plaintiff and the United States. § 6, 12 Stat. 698. In authorizing suits by private parties (known as relators) to collect the statutory forfeitures, the 1863 Act employed a venerable mode of procedure commonly referred to as a *qui tam* action. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 768 & n.1 (2000).

The Act was amended in 1943 to preclude "parasitic[al]" *qui tam* actions based upon information in the government's possession; to authorize the government to take over the prosecution of *qui tam* suits; and to reduce the relator's share of any recovery that such actions produced. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608; see *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649-650

[1] The 1863 Act separately provided that "any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war," who committed any of the proscribed acts would be subject to "trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death." § 1, 12 Stat. 696-697.

(D.C. Cir. 1994). In 1982, Congress recodified the Act and amended, *inter alia*, its liability provision, replacing the phrase "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States," with the phrase "[a] person not a member of an armed force of the United States." See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3729, 96 Stat. 978; 31 U.S.C. 3729 note; *Stevens*, 529 U.S. at 782. In 1985, Congress mandated the award of treble (rather than double) damages in any FCA case involving "a false claim related to a contract with the Department of Defense." See Act of Nov. 8, 1985, Pub. L. No. 99-145, Tit. IX, § 931(b), 99 Stat. 699; 31 U.S.C. 3729 note.

After a comprehensive re-examination of the FCA, Congress enacted the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, which substantially revised the Act "[i]n order to make the statute a more useful tool against fraud in modern times." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986) (*Senate Report*). In its current form, the FCA prohibits "[a]ny person" from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). The Act defines "claim" to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. 3729(c). At the time of the events that gave rise to this suit, a "person" who violated the FCA was "liable to the United States Government for a civil penalty of not less than $5,000 and not more than

$10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).[2]

The FCA continues to authorize enforcement actions to be filed either by the Attorney General or by private relators. Section 3730(a) provides that "[i]f the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person." 31 U.S.C. 3730(a). Section 3730(b)(1) states that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. 3730(b)(1).

When a *qui tam* action is filed, the government may intervene in the suit "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), in which case the government "shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action," 31 U.S.C. 3730(c)(1). If the government declines to take over the conduct of the litigation, "the person bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B). If a *qui tam* action results in the recovery of damages and civil penalties, the recovery is divided between the Government and the relator, with the relator receiving a maximum of 30% of the total award. 31 U.S.C. 3730(d).

2. Respondent Janet Chandler was hired by the Hektoen Institute for Medical Research to be project director of a federally-funded program designed to treat drug-dependent

[2] After the events that gave rise to this suit, the civil penalty range under the FCA was adjusted upward to a minimum penalty of $5500 and a maximum penalty of $11,000, pursuant to a statutory mandate applicable to civil penalties enforced by all federal agencies. See 64 Fed. Reg. 47,104 (1999) (implementing the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890).

pregnant women and to evaluate the success of the treatment. Pet. App. 2a-3a, 31a-32a. Respondent subsequently brought a *qui tam* action against the Institute, Cook County Hospital, and petitioner Cook County. The gravamen of the suit was that the defendants had violated the FCA by misrepresenting the results of the program to the federal government and by failing in various respects to comply with the terms of the grant and with applicable federal regulations in their provision of treatment to the women who participated in the program. *Ibid.* The United States did not intervene to take over the litigation.

Petitioner moved to dismiss the claims against it, arguing, *inter alia*, that as a unit of local government it could not be held liable under the FCA. The district court initially denied petitioner's motion to dismiss. See Pet. App. 40a-46a. The court found that the term "person" in Section 3729(a) includes state and local governments, *id.* at 40a-41a, and that the remedies available under the FCA are not "punitive" in character, *id.* at 43a-46a.

While the suit remained pending in the district court, this Court issued its decision in *Stevens*. The Court in *Stevens* held that a State or state agency is not a "person" subject to *qui tam* liability under the FCA. 529 U.S. at 778-787. The Court found no clear evidence in the text or history of the FCA that would overcome the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780. The Court also observed, *inter alia*, that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.* at 784-785.

Relying on *Stevens*, petitioner sought reconsideration of the district court's earlier order denying its motion to dismiss. The district court granted that motion and dismissed

respondent's complaint against petitioner. Pet. App. 27a-29a. The court found it "quite clear that under *Stevens* the County is immune from the imposition of punitive damages, which are mandatory if liability is found under the FCA." *Id.* at 28a.

3. The court of appeals reversed. Pet. App. 1a-26a. The court stated that "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person.' Nowhere in the text [of Section 3729] is there an exception for suits against municipalities. Nor have the parties suggested any other statutory provision that would limit the text before us." *Id.* at 8a (citation omitted). The court explained that the purpose of the 1986 FCA amendments was to increase the effectiveness of the Act, *id.* at 11a, and it found that "a study of the text and structure of the Act, supported by the available legislative history, leads to the conclusion that Congress intended to include counties within the meaning of 'person'" in Section 3729(a), *id.* at 13a.

The court of appeals rejected petitioner's contention that the court was "prohibited from interpreting the statute to include counties because of the municipalities' traditional, commonlaw immunity from punitive damages." Pet. App. 13a. The court acknowledged that municipalities are not subject to punitive damages under 42 U.S.C. 1983. Pet. App. 13a-14a (citing *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)). The court explained, however, that the remedies available under the FCA differ in significant respects from a traditional punitive damages award. *Id.* at 15a-16a. The court further observed that, in its view, counties were subject to liability under the original 1863 version of the FCA, *id.* at 16a, and it stated that Congress, in amending the Act in 1986, "did not indicate in any way that it intended to exempt municipal entities from the scope of the statute," *id.* at 17a.

The court of appeals also rejected petitioner's contention that this Court's decision in *Stevens* compelled dismissal of respondent's claims. Pet. App. 18a-20a. The court found that petitioner's "reading of *Stevens* cannot be squared with the essential rationale of that opinion nor with the established doctrinal differences, long recognized in our jurisprudence, between the status of the states of the Union and municipal entities." *Id.* at 19a. The court observed that "[t]he central holding of *Stevens* is that states are not within the FCA's definition of 'person' because of the 'longstanding interpretive presumption that "person" does not include the sovereign.'" *Ibid.* (quoting *Stevens*, 529 U.S. at 780). The court of appeals explained that, under this Court's decisions, "[t]he presumption cuts the other way for municipalities." *Id.* at 20a. The court concluded that "counties are not only amenable to the FCA but also are subject to the same penalties as other defendants." *Ibid.*

SUMMARY OF ARGUMENT

A. As this Court held in *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 685-689 (1978), the term "person" has long been understood to encompass artificial legal entities, including units of local government. Nothing in the text of the original 1863 FCA undermines the inference that the "person[s]" subject to liability under the Act included counties and municipalities. Moreover, local governments are as capable as natural persons or commercial corporations of submitting false claims to the federal government, and a locality's submission of a false claim causes the same harms as a private party's comparable wrongdoing. The text and purposes of the 1863 FCA thus establish that the Act's liability provision applied to local governments.

B. The 1986 FCA amendments, which were designed to *enhance* the effectiveness of the Act, did not simultaneously exclude local governments from its coverage by increasing

the applicable sanctions. Congress retained the word "person" to describe the class of potential FCA defendants, and the legislative history reflects congressional awareness of this Court's decision in *Monell*. Moreover, in light of the overriding thrust of the 1986 amendments, namely to strengthen and expand the FCA's remedial scheme, it is most unlikely that Congress would have exempted local governments from FCA coverage.

The fact that the FCA in its current form authorizes remedies having an essentially "punitive" component does not suggest that the 1986 amendments *exempted* local governments from all liability. Unlike 42 U.S.C. 1983, which does not explicitly address the question of damages, the FCA specifies the sanctions to be imposed on any "person" who is found to have committed the proscribed acts. And while the remedies mandated by the FCA may serve in part to punish wrongdoers, they are significantly different from traditional punitive damages.

Finally, this Court's precedents do not support petitioner's effort to invoke a presumption against imposition of punitive remedies as a basis for avoiding FCA liability altogether. The consequence of finding punitive damages unavailable in Section 1983 actions against municipalities was simply that punitive damages could not be recovered. Section 1983 actions against municipalities remained available, as did compensatory damages in such cases. Here, by contrast, petitioner advances an all-or-nothing position. Petitioner suggests that by expanding liability under the FCA, Congress ousted local governments from the Act's coverage entirely. Nothing in the amendments' text or history supports that counterintuitive result. If Congress had determined that the increased damages and civil penalties mandated by the 1986 amendments were not appropriately imposed upon local governments, the far more natural course would have been to retain, as to those defendants, the

sanctions (double damages plus $2000 per false claim) that were available under the prior version of the Act and that this Court had held to be predominantly remedial in character.

C. The Court's decision in *Stevens*, which held that States are not "person[s]" subject to *qui tam* liability under the FCA, does not control this case. Because state and local governments stand on quite different constitutional footing, there is nothing anomalous about subjecting local governments to forms of liability from which the States are exempt. And the reasoning of the Court in *Stevens* is largely inapplicable to the distinct question whether the FCA's liability question covers counties and municipalities.

ARGUMENT

LOCAL GOVERNMENTS HAVE BEEN "PERSONS" SUBJECT TO SUIT UNDER THE FALSE CLAIMS ACT SINCE ITS ENACTMENT IN 1863

A. The Text, History, And Purposes Of The 1863 False Claims Act Establish That Local Governments Have Been Subject To Potential Liability Under The Act Since Its Initial Passage In 1863

In *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 685-689 (1978), this Court held that municipal corporations are "persons" subject to liability under 42 U.S.C. 1983, which was originally enacted as Section 1 of the 1871 Civil Rights Act. The Court explained that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." 436 U.S. at 687. The Court also observed that "since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by § 1, and, further, since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been

excluded from the sweep of § 1." *Id.* at 685-686. The same considerations apply here.

1. When The FCA Was Enacted In 1863, The Term "Person" Was Understood To Encompass Units Of Local Government

As first enacted in 1863, the FCA imposed monetary liability on "any person not in the military" who submitted a false or fraudulent claim for payment by the United States government. § 3, 12 Stat. 698; see p. 2, *supra*. In *Monell*, this Court summarized its early jurisprudence concerning the legal status of commercial and municipal corporations. The Court observed that "[w]hen this Court first considered the question of the status of corporations, Mr. Chief Justice Marshall, writing for the Court, denied that corporations 'as such' were persons as that term was used in Art. III and the Judiciary Act of 1789. See *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 86 (1809)." 436 U.S. at 687. The *Monell* Court further explained, however, that "[b]y 1844, * * * the *Deveaux* doctrine was unhesitatingly abandoned." *Ibid.* The Court quoted its decision in *Louisville, Cincinnati, & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844), which held that "[a] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person." *Id.* at 558; see *Monell*, 436 U.S. at 687-688. The Court in *Monell* then explained that "in *Cowles* v. *Mercer County*, 7 Wall. 118, 121 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts." *Id.* at 688.[3]

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[3] Indeed, well before *Letson* the Court had held that a criminal statute proscribing the destruction of a vessel with intent to prejudice the underwriters applied to a corporate defendant. See *United States* v. *Amedy*, 24 U.S. (11 Wheat.) 392, 412-413 (1826). The Court explained:

> The mischief intended to be reached by the statute is the same, whether it respects *private* or *corporate* persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable. And the citation from 2 *Inst.* 736 establishes, that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. ch. 7. respecting the erection of cottages, where the word used is, "no *person* shall," &c. says, "this extends as well to persons *politic* and *incorporate*, as to natural persons whatsoever."

Id. at 412. In *Letson* itself, the Court similarly quoted with approval Lord Coke's statement that "every corporation *and body politic* residing in any county, riding, city or town corporate, or having lands or tenements in any shire, * * * are said to be inhabitants there." 43 U.S. (2 How.) at 558-559 (emphasis added). Those decisions belie the suggestion that the decision in *Cowles* represented a break from prior understandings of the scope of the term "person."

Petitioner contends (Br. 16) that "inasmuch as the 1863 Act was enacted six years before the *Cowles* decision, the holding in *Cowles* does not support the court of appeals' position that local governments were presumptively considered persons in 1863." If the decision in *Cowles* had *overruled* a prior understanding that the legal status of municipal corporations differed from that of commercial corporations, petitioner's argument might have some force. But neither *Cowles* itself, nor the *Monell* Court's description of the *Cowles* holding, supports that characterization of the 1869 decision. *Cowles* stated that the question of a municipal corporation's susceptibility to suit in federal court "presents but little difficulty." *Cowles* v. *Mercer County*, 74 U.S. (7 Wall.) 118, 121 (1869). In *Monell*, the Court explained that in *Cowles*, the principle that corporations should be subject to suit on the same terms as natural persons "was *automatically and without discussion* extended to municipal corporations." 436 U.S. at 688 (emphasis added). In support of its assertion that "[u]nder this doctrine, municipal corporations were routinely sued in the federal courts," *ibid.*, the *Monell*

Court relied on cases decided as early as 1864, see *id.* at 673 n.28, 688 n.49.

Thus, both *Cowles* and *Monell* treated the suability of municipal corporations on the same terms as natural persons as following logically and inevitably from the Court's 1844 decision in *Letson*. It is appropriate to presume that Congress, in enacting the FCA in 1863, acted on the basis of the same understanding. Indeed, petitioner cites *no* instance, during the period between 1844 and 1869, in which commercial and municipal corporations were treated distinctly for these purposes.[4]

2. Neither The 1863 Act's Reference To The Military Status Of Potential Defendants, Nor Its Provision For Imprisonment Of Violators, Suggested An Intent To Exclude Local Governments From Coverage

The 1863 Act contained separate provisions, establishing distinct sanctions, for (a) "any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war," and (b) "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States." §§ 1, 3, 12 Stat. 696, 698. The Act further provided that a "person not in the military" who committed the proscribed acts was subject not only to civil monetary sanctions, but also to criminal penalties including

[4] The Dictionary Act was enacted in 1871 and provided that "in all acts hereafter passed * * * the word 'person' may extend and be applied to bodies politic and corporate * * * unless the context shows that such words were intended to be used in a more limited sense." Dictionary Act, ch. 71, § 2, 16 Stat. 431. As petitioner points out (Br. 16 n.7), the Dictionary Act applied by its terms to federal statutes "hereafter passed" and therefore had no specific application to the 1863 FCA. The Dictionary Act nevertheless provides further evidence of a contemporaneous understanding that the term "person" as used in its ordinary sense included "bodies politic and corporate."

imprisonment. § 3, 12 Stat. 698. Petitioner contends (Br. 13) that the Act's "criminal penalties and military reference are * * * inherently inconsistent with local governmental liability."

That argument is misconceived. Of course, a county or other local governmental unit can neither be enrolled in the military nor subjected to imprisonment. But the same is true of commercial corporations, which have long been treated as "person[s]" within the meaning of the Act's liability provision. Given the established presumption that the word "person" includes artificial legal entities, a commercial or municipal corporation is very naturally characterized as a "person not in the military." And as with commercial corporations, the fact that a municipal corporation cannot be imprisoned does not suggest that Congress intended to exempt it from the 1863 Act's provisions imposing *monetary* liability.

In holding that States are not "person[s]" subject to *qui tam* liability under the FCA, the Court in *Stevens* referred to the above-cited provisions in concluding that "the text of the [1863 Act] does less than nothing to overcome the presumption that States are *not* covered." 529 U.S. at 782. With respect to corporations, however, the Court offered the following caveat: "We do not suggest that these features directed only at natural persons cast doubt upon the courts' assumption that § 3729(a) extends to corporations—but that is because the presumption with regard to corporations is just the opposite of the one governing here: they are presumptively *covered* by the term 'person.'" *Ibid.* (citation omitted). The Court thus made clear that any negative inference that might be drawn from the 1863 Act's references to military status and criminal penalties would not overcome

the established presumption that the term "person" encompasses artificial legal entities such as corporations.[5]

3. The 1863 Act Was Not Limited To War Profiteering, But Applied Broadly To All Forms Of Fraud Against The United States

Petitioner contends that, "[p]laced in its historical context, the 1863 Act was adopted as a response to the plundering of the public treasury in the purchasing of necessities of war." Pet. Br. 18 (internal quotation marks omitted). Petitioner states (Br. 18-19) that "[n]o court, to date, has identified any case of a local government having sold military goods to the United States during the Civil War, let alone defrauding the United States in the sale of military goods." But while war-related frauds may have furnished the immediate impetus to enactment of the FCA, see *Stevens*, 529 U.S. at 781, Congress did not limit the reach of the Act to war profiteering. "In the various contexts in which questions of the proper construction of the [FCA] have been presented, the Court has consistently refused to accept a rigid, restrictive reading," but rather has construed the Act to extend to "all fraudulent attempts to cause the Government to pay out

[5] Contrary to petitioner's suggestion (Br. 17), Congress's decision in 1863 to deal separately with "person[s] in the land or naval forces of the United States" and "person[s] not in the military or naval forces of the United States" (§§ 1, 3, 12 Stat. 696, 698) does not reflect an intent that any category of "person" would be exempt from FCA liability. Taken together, those categories include *all* "person[s]" who might engage in the prohibited conduct. Congress dealt with the two classes separately so that military personnel who committed the proscribed acts could be sanctioned in a different manner (including trial by court-martial, see § 1, 12 Stat. 697) from civilian violators. As petitioner points out (Br. 17), the Court in *Stevens* rejected the "proposition that the FCA was intended to cover all types of *fraudsters*." 529 U.S. at 781 n.10. The scope of the 1863 Act's coverage was limited, however, only in the sense that its liability provision was restricted to "person[s]." Congress's decision to limit the Act's coverage in that manner does not suggest that any entity traditionally regarded as a legal "person" should also escape liability.

sums of money." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232, 233 (1968); see *Stevens*, 529 U.S. at 781 n.10 (explaining that *Neifert-White* "stand[s] for the unobjectionable proposition (codified in [31 U.S.C.] § 3729(c)) that the FCA was intended to cover all types of *fraud*").

Counties and municipalities are as capable as natural persons or commercial corporations of submitting false claims for payment to the federal government. Submission of a false claim by a local government, moreover, threatens the federal fisc and the integrity of federal funding programs in precisely the same way as does a private party's comparable misconduct. Compare *Monell*, 436 U.S. at 685-686 (construing 1871 Civil Rights Act to apply to municipalities because, *inter alia*, "municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied"). The fraudulent conduct alleged in this case (see p. 5, *supra*), for example, is no less disruptive of federal interests than comparable wrongdoing committed by a private hospital. The legislative purposes underlying the 1863 Act therefore support, rather than undermine, application of the established interpretive rule that the term "person" is presumed to encompass local governments.

4. The 1982 FCA Amendments Reinforce The Conclusion That Local Governments Were Intended To Be Covered By The Act

In 1982, Congress recodified the Act and, *inter alia*, amended its liability provision, replacing the phrase "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States," with the phrase "[a] person not a member of an armed force of the United States." See p. 3, *supra*. At the time of the 1982 amendments, this Court's *Monell* decision reaffirming that the term "person" presumptively encompasses local governments was just four

years old (see pp. 9-12, *supra*), and the Court had construed the FCA expansively to cover all forms of fraud upon the United States (see pp. 14-15, *supra*). Moreover, the FCA remedies available at that time—double damages plus a civil penalty of $2000 per false claim—had been held to serve predominantly compensatory purposes, and so would not implicate any concerns regarding punitive liability. See *United States* v. *Bornstein*, 423 U.S. 303, 315 (1976) (FCA's remedial provisions reflect "the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims"); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943) ("We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."). In recodifying and amending the Act in 1982, Congress would therefore have had every reason to conclude that a provision imposing FCA liability upon "person[s]" would be understood to cover counties and municipalities. Under those circumstances, Congress's decision to retain the word "person" to describe the class of potential FCA defendants reinforces the conclusion that local governments were intended to be covered by the Act.

B. The Text And Purposes Of The 1986 FCA Amendments Reinforce The Conclusion That Local Governments Are Subject To *Qui Tam* Liability Under The Act

The 1986 FCA amendments increased the applicable monetary sanctions, to three times the government's damages plus a civil penalty of between $5000 and $10,000. See pp. 3-4, *supra*. (The civil penalty range has since been increased to $5500-$11,000 to account for inflation. See note 2, *supra*.) In *Stevens*, the Court held that "the current

version of the FCA imposes damages that are essentially punitive in nature." 529 U.S. at 784; see *id.* at 784-786. Petitioner contends that, even if local governments were "person[s]" subject to suit under the FCA as originally enacted in 1863, the effect of the 1986 amendments was to "immuniz[e] local governments from FCA suits." Pet. Br. 22; see *id.* at 21-37.

That argument lacks merit. Because Section 3729(a) continues to impose liability upon a "person" who commits one of the proscribed acts, there is no basis for inferring that Congress intended in 1986 to narrow the range of potential FCA defendants by ousting municipal corporations from the Act's coverage. To the contrary, the overall thrust of the 1986 amendments was to expand the sweep of the FCA to make it a more effective tool for combating fraud. Congress's decision to increase the applicable monetary penalties provides no ground for giving the term "person" other than its usual construction.

1. As Amended In 1986, The FCA Continues To Use The Word "Person" To Describe The Class Of Potential Defendants

Like the original 1863 Act, the FCA as amended in 1986 uses the term "person" to describe the category of potential FCA defendants. 31 U.S.C. 3729(a). The 1986 amendments were enacted only eight years after this Court's decision in *Monell*, which explained that the term "person" had been understood for more than a century to encompass local governmental units. Given that settled understanding, it is most unlikely that Congress would have continued to use the word "person" in Section 3729(a) if it had intended to exempt local governments from liability under the Act, or that it would have signaled its intent to oust previously-covered localities by so indirect and elliptical a means as expanding available monetary remedies.

The Senate Report accompanying the 1986 amendments expressed the understanding, with respect to the prior version of the Act, that "[t]he term 'person' is used in its broad sense to include partnerships, associations, and corporations * * * as well as States and political subdivisions thereof." *Senate Report* 8. In support of that proposition, the Report cited (*inter alia*) this Court's decision in *Monell*. *Ibid.* This Court in *Stevens* found that legislative history to be an insufficient basis for departing from the usual presumption that the word "person" does not encompass States, at least with respect to the imposition of *qui tam* liability under the Act. See 529 U.S. at 780-781, 783 n.12. In the present case, however, the question is whether petitioner has carried its burden of establishing that Congress intended the 1986 amendments to *remove* local governments from coverage, in derogation of the usual presumption that the term "person" *does* include localities. The Senate Report's express reference to "political subdivisions," and its citation to *Monell*, belie that contention.

2. In Amending The FCA In 1986, Congress Sought To Expand And Strengthen The Remedies Available Under The Act

Petitioner's contention that the 1986 FCA amendments entirely removed local governments from coverage also runs counter to the overriding purposes of the 1986 legislation. As the court of appeals recognized, "Congress' purpose in enacting those amendments was to increase the effectiveness of the Act." Pet. App. 11a; see *Senate Report* 2 (noting that "[t]he main portions of the act have not been amended in any substantial respect since signed into law in 1863," and that amendments were appropriate "[i]n order to make the statute a more useful tool against fraud in modern times"); *House Report* 16 ("The purpose of [the legislation] is to amend the existing civil false claims statute in order to

strengthen and clarify the government's ability to detect and prosecute civil fraud and to recoup damages suffered by the government as a result of such fraud."). Congress's objective was to *strengthen* FCA enforcement and to *expand* the remedies available to the government. *Inter alia*, the 1986 amendments increased the amount of damages and penalties to be awarded for violations; clarified the Act's scienter requirement and its definition of "claim"; expanded the rights of *qui tam* relators and allowed them to recover a somewhat greater share of any monetary award; and enhanced the government's ability to conduct investigations prior to the filing of FCA suits. See *House Report* 17.

In light of Congress's overriding intent to strengthen and expand a remedial scheme that had become outmoded over time, it is most unlikely that Congress would have simultaneously exempted local governments from FCA coverage altogether. That is especially so in light of the fact that local governments receive a substantial, and steadily increasing, share of federal funds. See Pet. App. 18a ("Billions of dollars flow from the federal government to municipalities each year."); Pet. Br. 19 (stating that "the number of federally-funded services provided by local governments are largely the result of legislation passed in the latter half of the twentieth century"). And it is particularly unlikely that Congress would have sought to exempt such a significant class of federal funding recipients from the Act's enforcement mechanisms without (a) changing the word ("person") used to describe potential FCA defendants, or (b) alluding to such an intent at any point in the 1986 legislative history.

3. The Fact That The 1986 Amendments Added A Punitive Component To The FCA Remedies Does Not Suggest That Congress Intended To Oust Local Governments From The Act's Coverage

In contending that the 1986 amendments should be read to oust previously-covered localities from the scope of the FCA, petitioner principally relies on this Court's decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981). In *Fact Concerts*, the Court held that punitive damages are unavailable in a suit against a municipality under 42 U.S.C. 1983. See 453 U.S. at 258-271. Petitioner contends (Br. 28) that "[t]he absence of an explicit abrogation of immunity in the liability provision of the FCA is a clear indication that Congress did not intend to impose punitive damages on local governments." Petitioner's reliance on *Fact Concerts* is misplaced.

a. Section 1983 does not specify the remedies that are available in a suit against a local government. Rather, it states that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.*

42 U.S.C. 1983 (emphasis added). Because "[t]he Members of the Congress that enacted § 1983 did not address directly the question of damages," *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978), this Court has relied heavily on background presumptions and understandings regarding the appropriate elements of recovery in particular circumstances. See, *e.g.*,

Smith v. *Wade*, 461 U.S. 30, 34 (1983) ("In the absence of more specific guidance, [this Court has] looked first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute.") (citing *Carey*, 435 U.S. at 253-264).

In *Fact Concerts*, the Court explained that "[i]t was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive or exemplary damages." 453 U.S. at 259-260 (footnote omitted). "Finding no evidence that Congress intended to disturb the settled common-law immunity," *id.* at 266, and perceiving no overriding policy justification for subjecting municipalities to punitive damages under Section 1983, *id.* at 266-271, the Court construed that statute not to authorize a punitive damages award against a local government. Municipalities remained proper defendants under Section 1983, and compensatory damages remained available in actions against local governments. Because Section 1983 does not explicitly authorize punitive damages, let alone require that they be awarded in any particular case, the determination that punitive damages were not an appropriate item of relief in a suit against a municipality was entirely consistent with the Court's recognition that a municipality is a "person." Taken together, this Court's decisions in *Monell* and *Fact Concerts* interpreted Section 1983 in a manner consistent *both* with the understanding of the term "person" that prevailed in 1871, and with 1871-era judicial opinions regarding the appropriate scope of remedies in a suit against a local government.

Unlike Section 1983, the FCA precisely defines the sanctions to be imposed on any "person" who is found to have committed the acts proscribed by the statute. 31 U.S.C.

3729(a). In light of the established meaning of the word "person," the clear import of the statutory text is that the remedies specified in Section 3729(a)—treble damages and civil penalties—may properly be imposed upon localities. Petitioner is therefore wrong in contending that "[t]he text of the 1986 amendments contains no expression of any intent by Congress that the FCA's punitive damages be imposed on local governments." Pet. Br. 26. Although the amended Section 3729 does not refer in terms to local governments (just as it does not refer in terms to commercial corporations), the term "person" has long been understood to encompass counties and municipalities, and the FCA unambiguously imposes liability for treble damages and civil penalties on "[a]ny person" who commits the proscribed acts. Petitioner seeks to use the "presumption that local governments are not subject to punitive damages" (*id.* at 24), not as a default rule that applies in the absence of express congressional guidance, but as a basis for departing from the pertinent statutory language. *Fact Concerts* does not support that approach.

b. Although the remedies mandated by the FCA may serve in part to punish wrongdoers, they are sufficiently different from traditional punitive damages that the policy concerns identified in *Fact Concerts* (see 453 U.S. at 266-271) apply with sharply reduced force. Cf. *American Soc'y. of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) (explaining that the "rule limiting [a] principal's liability for punitive damages does not apply to special statutes giving triple damages"). The Court in *Fact Concerts* noted "the broad discretion traditionally accorded to juries in assessing the amount of punitive damages," and it observed that "[b]ecause evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury,

in effect encouraging it to impose a sizable award." 453 U.S. at 270. Under the FCA, by contrast, the scope of the award is not left to the discretion of the jury but is instead specified by the statute. There is consequently no danger that the (actual or perceived) wealth of a local governmental defendant will induce the jury to award punitive remedies greater than those that Congress deemed appropriate for FCA violations generally. And because the bulk of any recovery in a *qui tam* action goes to the federal government, the concern that a punitive damages award will divert public resources to private hands (see *id.* at 267) has significantly less force in this setting.[6]

The conduct proscribed by the FCA, moreover, has an inherent financial component: the Act is directed at corrupt efforts to obtain federal *money*. As the court of appeals recognized, "[u]nder the FCA, at least a portion of the recovery will come from the monies taken by the municipality through its false claims, whereas under § 1983 both the compensatory and punitive damages come directly from the tax base." Pet. App. 15a. The financial character of the prohibited conduct also increases the likelihood that the availability of FCA remedies will deter municipal violations. The Court in *Fact Concerts* found it "far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." 453 U.S. at 268. FCA violations that are attributable to local governmental bodies, however, will

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[6] The concern that public resources may be diverted to private parties is especially misplaced with respect to FCA suits initiated by the federal government, in which the United States retains the entirety of any award. The clear thrust of petitioner's argument is that local governments are exempt from FCA liability in those suits as well. See Pet. Br. 37-38 (arguing that exemption of local governments from the FCA's coverage leaves avenues of redress *other than the FCA*).

often result from the responsible officials' illicit efforts to obtain federal money for their localities. A local official who is willing to act dishonestly in order to further the locality's financial interests may well be deterred by the prospect that substantial monetary liability will be imposed upon the local government.

c. *Fact Concerts* does not support petitioner's contention that the 1986 amendments ousted localities from the FCA's coverage entirely. In holding that municipalities are not subject to punitive damages in suits under 42 U.S.C. 1983, the Court in *Fact Concerts* did not cast doubt on the prior determination in *Monell* that a local government is a proper defendant under Section 1983 and may be sued for appropriate *compensatory* relief. See *Fact Concerts*, 453 U.S. at 267 (because punitive damages "are assessed over and above the amount necessary to compensate the injured party * * *, there is no question here of equitably distributing the losses resulting from official misconduct"). In the present case, by contrast, petitioner relies on the presumption that localities are not subject to punitive remedies as a means of taking municipalities completely outside the FCA's coverage.[7]

There is no logical reason that Congress's decision in 1986 to increase the sanctions for FCA violations would have led it to exempt local governments from the sanctions to which they had previously been subject. If Congress had deter-

[7] Petitioner contends (Br. 37-38) that the United States will not be left without redress because other mechanisms are available by which it may recover losses caused by fraud. The House Report accompanying the 1986 FCA amendments observed, however, that "[a]lthough the Government may also pursue common law contract remedies, the False Claims Act is a much more powerful tool in deterring fraud and is used as the primary vehicle by the Government for recouping losses suffered through fraud. Thus, it is important that it be an effective tool for recouping these losses." *House Report* 18. More broadly, the long history of *qui tam* actions under the FCA underscores the congressional judgment that suits by the government alone may not be sufficient to deter false claims.

mined that the increased damages and civil penalties mandated by the 1986 amendments were not appropriately imposed upon local governments, the far more natural course would have been to retain, as to those defendants, the sanctions (double damages plus $2000 per false claim) that were available under the prior version of the Act. Congress did not limit the available remedies in that manner, but instead mandated categorically that the new remedial structure would apply to "[a]ny person" who engaged in the prohibited conduct. The *Fact Concerts* presumption is not grounded in the Constitution, but is merely an aid in ascertaining Congress's intent. It cannot bear the weight of attributing to Congress the intent of ousting municipalities from the Act entirely when it acted to expand liability for all defendants.

d. Congress's 1985 amendment to the FCA underscores the weakness of petitioner's effort to rely on the *Fact Concerts* presumption to oust municipalities from the Act's coverage. In 1985, Congress expanded liability from double to treble damages only for claims involving contracts with the Department of Defense. See p. 3, *supra*. Under petitioner's theory, that amendment expressed a congressional intent that municipalities should be treated as "persons" subject to FCA liability for some government contracts but not others (indeed, for all contracts except those as to which Congress expressed the greatest concern). In reality, the 1985 amendment indicates that Congress has viewed the questions of the Act's coverage and the Act's remedies as distinct questions, and in *expanding* the scope of available remedies in 1985 and 1986 did not simultaneously intend to *contract* the scope of the Act's coverage. The Senate Report accompanying the 1986 FCA amendments explained that the amendments provided for treble damages in FCA cases generally in order "to comport with [the 1985] legislation * * * which established treble damage liability for false

claims related to contracts with the Department of Defense." *Senate Report* 17.

C. The Court's Decision In *Stevens* Does Not Control This Case

The district court initially denied petitioner's motion to dismiss. Pet. App. 40a-46a. After this Court issued its decision in *Stevens*, however, the district court granted petitioner's motion for reconsideration and dismissed respondent's claims. *Id.* at 27a-29a. The court's reliance on *Stevens* was misplaced.[8]

1. Local Governments Are Frequently Subjected To Forms Of Liability From Which The States Are Exempt

The *holding* in *Stevens*—*i.e.*, that States are not subject to *qui tam* suits under the FCA—is not controlling here, since there is nothing anomalous about subjecting local governments to forms of liability from which the States are exempt. To the contrary, this Court has frequently recognized that state and local governments stand on quite different constitutional footing. See Pet. App. 19a (noting "the established doctrinal differences, long recognized in our jurisprudence, between the status of the states of the Union and municipal entities.").

[8] The suit in *Stevens* was brought by a *qui tam* relator, and the Court's holding was limited by its terms to the proposition that a State or state agency is not subject to FCA liability in such *private* actions. 529 U.S. at 787-788. The Court did not purport to resolve the question whether a State or state agency may be sued under the FCA in an action filed by the Department of Justice on behalf of the United States. See *id.* at 789 (Ginsburg, J., concurring). The instant case similarly does not present the question whether counties are subject to FCA liability in suits initiated by the federal government. The clear import of petitioner's argument, however, is that local governments are exempt from liability in that category of suits as well as in *qui tam* actions. See note 6, *supra*.

Thus, an "important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden* v. *Maine*, 527 U.S. 706, 756 (1999); see, *e.g.*, *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations.") (citations omitted). The general interpretive rule that local governments are presumptively encompassed by the word "person," while States presumptively are not, reflects the States' distinct sovereign status. See *Stevens*, 529 U.S. at 780 ("We must apply to [31 U.S.C. 3729(a)] our longstanding interpretive presumption that 'person' does not include the sovereign."); *id.* at 780-781 & n.9 (explaining that in light of the States' sovereign status, "both comity and respect for our federal system demand that something more than mere use of the word 'person' demonstrate the federal intent to authorize unconsented private suit against them"); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989) (holding that a State is not a "person" subject to liability under 42 U.S.C. 1983, and explaining that "it does not follow that if municipalities are persons then so are States. States are protected by the Eleventh Amendment while municipalities are not").

2. The Reasoning Of The Court In Stevens *Does Not Indicate That Local Governments Are Exempt From Liability Under The FCA*

The *reasoning* of the Court in *Stevens* provides little support for petitioner's contention that it is exempt from *qui tam* liability under the Act. The linchpin of the Court's analysis—its recognition that the word "person" in 31 U.S.C.

3729(a) should be construed in light of background understandings of that term, see 529 U.S. at 780-782—cuts against petitioner's position in this case, since the term presumptively encompasses local governmental units. The Court in *Stevens* also noted that States are expressly included in the definition of "person" in 31 U.S.C. 3733(*l*)(4), which applies to the FCA's provisions for issuance of civil investigative demands. 529 U.S. at 783-784. From the absence of a comparable reference to States in Section 3729(a), the Court inferred that Congress did not intend to subject the States to *qui tam* liability. *Id.* at 784. The Court made clear, however, that its reasoning would not apply to any entities described in Section 3733(*l*)(4) that are presumptively covered by the term "person." *Id.* at 784 n.14.

The Court in *Stevens* also found that States are not included in the definition of "person" contained in the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801 *et seq.*, a parallel scheme that created administrative remedies in cases involving false claims. 529 U.S. at 786. The Court stated that "[i]t would be most peculiar to subject States to treble damages and civil penalties in *qui tam* actions under the FCA, but exempt them from the relatively smaller damages provided under the PFCRA." *Ibid.* Because the "persons" subject to potential liability under the PFCRA include "any * * * corporation," *ibid.* (quoting 31 U.S.C. 3801(a)(6)), respondent and other local governments are covered by the PFCRA, and the potential anomaly noted by the *Stevens* Court therefore does not exist here. The Court in *Stevens* further explained that its reading of Section 3729(a) as excluding States would preserve the federal-state balance and would obviate the need to resolve a serious Eleventh Amendment question. 529 U.S. at 787. Because petitioner is not an "arm of the State" of Illinois and has no immunity from suit under the Eleventh Amendment, see p. 27, *supra*, those concerns are inapplicable in this case.

In granting petitioner's motion to dismiss, the district court relied almost exclusively on the *Stevens* Court's determination that the remedies available under the FCA are "punitive" in character. See Pet. App. 28a-29a. In *Stevens*, however, this Court invoked "the presumption against imposition of punitive damages on governmental entities" (529 U.S. at 785) simply as an additional factor that reinforced the presumption *against* interpreting the term "person" to include the sovereign and confirmed what the Court otherwise regarded as the most natural reading of the statutory language. See *id.* at 784-786. Nothing in *Stevens* suggests that a court may disregard the presumption *in favor of* interpreting the term "person" to include corporations, the established meaning of a statutory term, and other indicia of congressional intent, in order to avoid subjecting a local government to sanctions having an essentially punitive component.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *EX REL.* JANET CHANDLER, PH.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether local governmental entities are subject to *qui tam* actions under the False Claims Act.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have an obvious and vital interest

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and their letters of consent have been

in judicial decisions affecting the exposure of local governmental entities to penal sanctions such as those imposed under the False Claims Act.

Local governmental entities have traditionally been immune from suits seeking punitive damages. Nonetheless, they have increasingly been named by *qui tam* relators as defendants in False Claims Act suits. Unless it is reversed, the Seventh Circuit's determination that local governmental entities are subject to FCA *qui tam* actions will throw open the floodgates to a tidal wave of *qui tam* litigation against such defendants.

The effect of subjecting cities, counties, towns, and villages to FCA *qui tam* liability cannot be overstated. Merely having to defend against such lawsuits will strain the limited budgets of these entities. To avoid the risk of the massive penalties that can be imposed under the FCA, moreover, these entities (like the private entities subject to the FCA) may be forced to pay significant sums to settle all but the most frivolous of these cases. These unprecedented expenditures may well interfere with the ability of local governments to perform their essential functions and provide services to their citizens. Indeed, a significant FCA judgment could bankrupt a county, town, or other small municipality. In addition, the prospect of FCA liability may make some municipalities reluctant to participate in federal programs.

Because of the importance of the question presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

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filed with the Clerk. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici*, their members or counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Local governmental entities have been immune from punitive damages at common law for over 150 years. In its decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court reaffirmed the strong presumption that local governmental entities are immune from punitive awards imposed under federal law. The Court explained that neither the retributive nor the deterrence rationale of punitive damages was furthered by punishing governmental entities. Instead, such awards operate only to punish the innocent citizens of a municipality for the actions of others, threatening increased taxes, reduced services, and bankruptcy of the municipality itself.

Because of the longstanding common law tradition of municipal immunity from punitive damages, this Court presumes that Congress understands and respects that immunity when it enacts federal law. As a result, this Court will interpret federal statutes to retain the common law immunity from punitive liability unless the statute clearly and expressly provides to the contrary.

The False Claims Act contains no specific provision that could possibly operate to deprive local governmental entities of their immunity from punitive damages. The original enactment of the FCA in 1863 provided no clear statement that municipalities were "persons" subject to the Act. The Seventh Circuit's assumption that municipalities were presumptively considered "persons" in 1863 results from its misreading of this Court's precedent.

The 1986 amendments to the FCA radically transformed the statute, essentially creating a new cause of action. The increased civil penalties and treble damages available following the amendments converted the previous remedial damages scheme into a punitive regime. The amendments also vastly increased the financial incentives for private *qui*

tam relators to file suit, which has predictably given rise to a flood of FCA litigation since 1986. Unlike the Federal Government, moreover, private relators do not exercise prosecutorial discretion in determining whether to threaten municipalities with punitive liability under the FCA. It would take an exceptionally clear statement to demonstrate that Congress intended to subject local governments to this new, untethered punitive liability.

The 1986 amendments contain no such clear statement. This Court's analysis in *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), demonstrates that the 1986 FCA amendments did not evince any intent by Congress to displace the traditional governmental immunity from punitive damages. Tellingly, the court below did not purport to find such a clear statement in the FCA. Rather, the court inverted the correct approach, incorrectly presuming that municipalities were "persons" in 1863 and requiring Cook County to find a clear statement that it was immune from the FCA. Under the proper analysis, employed by this Court in both *City of Newport* and *Stevens*, governmental entities are presumed to be immune from the FCA's punitive damage scheme absent a clear statement in the FCA that abrogates municipal immunity. No such clear statement exists, and the judgment below accordingly must be reversed.

ARGUMENT

I. CONGRESS MUST CLEARLY STATE ITS INTENTION TO ABROGATE LOCAL GOVERNMENTAL ENTITIES' LONGSTANDING IMMUNITY FROM PUNITIVE DAMAGES

A. Local Governmental Entities Have Long Enjoyed Common Law Immunity From Punitive Damages

Since the mid-nineteenth century, "the immunity of a municipal corporation from punitive damages at common law [has] not [been] open to serious question." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981). As this Court explained in *City of Newport*, "[l]ocal units of government initially were shielded from tort liability by the doctrine of sovereign immunity." *Id.* at 259 n.19. Although courts later declined to extend absolute sovereign immunity to local governments, they "viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Id.* at 263.[2] Accordingly, "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Id.* at 261 n.21. See also *Barnes* v. *Gorman*, 122 S.Ct. 2097, 2103 (2002) (Stevens, J., concurring in the judgment).

In *City of Newport*, the Court reviewed in detail the reasons why "[d]amages awarded for *punitive* purposes * * * are not

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[2] See, *e.g.*, *Foss* v. *Maine Turnpike Auth.*, 309 A.2d 339, 345-346 (Me. 1973) ("the deterrent function of exemplary damages is wholly negated" if applied against innocent taxpayers); *Fisher* v. *City of Miami*, 160 So. 2d 57, 60 (Fla. Ct. App. 1964) (permitting punitive damages would "penalize[] the public in order to accomplish nothing" because public cannot control wrongdoers); *Town of Newton* v. *Wilson*, 91 So. 419, 419-420 (Miss. 1922) (subjecting taxpayers to "punishment for the willful and malicious acts of its servants would be to contravene sound public policy").

sensibly assessed against the governmental entity itself." *Id.* at 267. The Court recognized that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Id.* at 266-267. As the Court explained, neither the retributive nor the deterrence rationale of punitive damages is furthered when those damages are imposed upon local governmental entities.

"Regarding retribution," the Court observed "that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort." *City of Newport*, 453 U.S. at 267. Punitive damages are "likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Ibid.* These costs are borne disproportionately by the "widows, orphans, aged men and women, and strangers" who depend upon the services provided by the municipality. *Id.* at 261 (quoting *McGrary* v. *President & Council of the City of Lafayette*, 12 Rob. 668, 677 (La. 1846)). Thus, the Court declared, "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff" that is paid by persons who had no part in the wrongful conduct. *Id.* at 267. "Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Ibid.*

The Court also concluded that the award of punitive damages against local governments could not be justified on a deterrence rationale. First, the Court found it unlikely that local government officials "would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." *City of Newport*, 453 U.S. at 268. As a result, "the impact on the individual tortfeasor of this deterrence in the air is at best uncertain." *Id.* at 269.

Second, to the extent that individual officials were susceptible to deterrence by actions against the municipality, the Court found no reason to believe that they could be deterred only by penalties such as punitive damages. "The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Id.* at 269 (quoting *Carlson* v. *Green*, 446 U.S. 14, 21 (1980)).

Third, the Court found that the deterrent effect of punitive damages would not operate any more effectively on "the electorate at large." *Id.* at 269. Even if such deterrence were necessary or desirable, moreover, the Court concluded that compensatory damages were likely sufficient to provide that deterrence. See *ibid.* ("if additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office").

Finally, the Court observed that "there is available a more effective means of deterrence" than imposing punitive awards on municipalities. *City of Newport*, 453 U.S. at 269. Deterrence could be better obtained "[b]y allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources." *Ibid.* In sum, the Court concluded that punitive damages would have their intended effect only if they punished the wrongdoer, rather than the municipality for which the wrongdoer worked.

While concluding that there is no public benefit to imposing punitive damages on local governmental entities, the Court emphasized that "the costs [of doing so] may be very real." *Id.* at 270. Because the perceived "unlimited taxing power" of a municipality makes it a deep pocket that is a natural target for punitive damages suits, allowing punitive damages against municipalities "may create a serious risk to the financial integrity of these governmental entities." *Ibid.*

Given "the possible strain on local treasuries and therefore on services available to the public at large," the Court deemed it "unwise to inflict the risk." *Id.* at 271.

B. Congress Must Clearly State Its Intention To Abrogate This Immunity By Statute

In *City of Newport*, this Court ruled that Congress did not intend to subject local governmental entities to punitive damages under the Civil Rights Act of 1871. That decision establishes the proper framework for determining whether Congress intended to abrogate such entities' traditional immunity from punitive damages when it enacted other statutes, such as the FCA.

The Court posited that when it enacted the Civil Rights Act, Congress was "familiar with common-law principles," including immunities, and "intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport*, 453 U.S. at 258. In particular, by 1871, the tradition of municipal immunity from punitive damages was sufficiently strong that the Court presumed that "Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 263 (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)). Accordingly, although municipalities plainly were subject to *compensatory* liability under the Civil Rights Act, the Court concluded that they could not be held liable for punitive damages under that statute.

Since *City of Newport*, the presumption against punitive liability has been the starting point for any analysis of whether local governmental entities are subject to punitive damages under a particular statute. Absent "*specific provisions* to the contrary," this Court will conclude that Congress intended for local governmental entities to retain their traditional immunity from punitive damages. *Id.* at 258 (emphasis added); see also *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989) (Congress intends to retain common law immunities existing at the time a statute was enacted in the absence of "specific provisions to the contrary").

II. THE FALSE CLAIMS ACT DOES NOT REFLECT CONGRESSIONAL INTENT TO SUBJECT LOCAL GOVERNMENTAL ENTITIES TO PUNITIVE DAMAGES

Both the original False Claims Act and the 1986 amendments were enacted against the well-established common law rule that local governmental entities are immune from punitive damages. Accordingly, the Court will not conclude that Congress intended to subject local governments to the FCA's penalties absent a clear statement of that intent. In fact, there is no basis for finding congressional intent to subject local governmental entities to the extraordinary risks and burdens of defending suits under the FCA.

A. Congress Did Not Express An Intention To Subject Local Governmental Entities To The FCA In 1863

The False Claims Act was enacted in 1863 "with the principal 'goal of stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (quoting *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976)) (alteration in *Stevens*). This legislative purpose provides no basis to conclude that local governmental entities were intended as potential defendants.

The text of the statute similarly does not indicate that municipalities were among the FCA's intended targets. The statute applies to any "person" who commits the prohibited acts. 31 U.S.C. § 3729(a). The statute does not define "person," and nothing in the text or legislative history

provides a basis for concluding that Congress intended to include municipalities within that term.[3]

The Seventh Circuit relied exclusively on *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978), in determining that, in 1863, Congress intended to make municipalities "persons" subject to the FCA. According to the court of appeals, *Monell* establishes that "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person.'" Pet. App. 8a (citing *Monell*, 436 U.S. at 685-689). The court of appeals appears to have misunderstood this Court's decision in *Monell*, however.

In *Monell*, this Court explained that, in 1844, it had determined that *private* corporations should be treated as "persons." See 436 U.S. at 687-688 (citing *Louisville R. Co.* v. *Letson*, 2 How. 497, 558 (1844)). But it was not until 1869 —six years *after* the FCA was enacted—that the Court established that "the *Letson* principle extended * * * to municipal corporations," and that such entities routinely became subject to suit in federal court. *Monell*, 436 U.S. at 688 (citing *Cowles* v. *Mercer County*, 7 Wall. 118, 121 (1869)). *Monell* thus does not support the Seventh Circuit's conclusion that Congress intended to subject municipal corporations to suit under the FCA in 1863.

Indeed, our research yields *no* cases between 1863 and 1986 (when Congress significantly amended the statute) involving suits against local governmental entities under the FCA. This strongly suggests a common understanding that municipalities were not subject to the Act. See also *United States ex rel. Garibaldi* v. *Orleans Parish Sch. Bd.*, 244 F.3d 486, 490 n.4 (5th Cir. 2001) (finding only two cases prior to this Court's decision in *Stevens*—both decided after the 1986

[3] *Amici* wholly agree with petitioner Cook County that an analysis of the structure of the 1863 FCA further demonstrates that local governments were not included as "persons" subject to the Act. See, *e.g.*, Pet. 21-22.

amendments—considering whether municipalities are "persons" within the meaning of the FCA), cert. denied, 122 S. Ct. 808 (2002).

B. Congress Did Not Subject Local Governmental Entities To Punitive Damages In 1986

The 1986 amendments to the FCA fundamentally changed the nature of the Act. Congress greatly enhanced the penalties and damages imposed against violators, and it dramatically expanded the role of private *qui tam* relators as FCA plaintiffs. If Congress had intended to subject local governmental entities to the threat of punitive damages in suits brought by private parties, the presumption against the imposition of punitive damages required a clear statement of its intent to do so. The 1986 amendments, however, contain no indication that Congress possessed such an intent.

1. The 1986 Amendments Completely Transformed The False Claims Act

The 1986 amendments transformed the FCA from a seldom-employed remedial statute into a sledgehammer that gives private relators the financial incentive to pursue even marginal claims. These amendments were more than mere adjustments to the law. They created "a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997).[4]

[4] Although the amendments radically altered the remedies available under the Act and the incentives for private *qui tam* relators to file suit under the Act, the amendments did not enlarge the scope of "persons" subject to the Act. See *Stevens*, 529 U.S. at 783 n.12 ("the term 'person' has remained in the statute unchanged since 1863").

a. The 1986 Amendments Converted The False Claims Act To A Punitive Statute

The 1986 amendments changed the FCA from a statute designed to compensate the Federal Government to one intended to punish offenders. The FCA's original damages provisions—$2,000 per violation plus double damages (see Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698)—were remedial rather than punitive. See *Stevens*, 529 U.S. at 785 (contrasting earlier remedial model with post-1986 punitive damages); *Bornstein*, 423 U.S. at 314 ("Congress intended the double-damages provision to play an important role in *compensating* the United States") (emphasis added). In 1986, however, Congress increased defendants' potential liability to $10,000 for each false claim. See False Claims Act Amendments of 1986, Pub. L. No. 99-562, §§ 3, 4, 100 Stat. 3154, 3157 (1986). In addition, Congress increased the double-damages provision to treble damages. *Ibid.*; compare 31 U.S.C. § 3730(a) (1982) with 31 U.S.C. § 3729(a) (2000).

This Court has expressly held that "the current version of the FCA imposes damages that are essentially punitive in nature." *Stevens*, 529 U.S. at 784. As the Court explained in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981), "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." Even the court of appeals did not question that the 1986 FCA amendments created a punitive damages regime. See Pet. App. 13a ("damages under the FCA are now considered to be punitive"); see also *Perez* v. *Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 624 (7th Cir. 2000) (Easterbrook, J.) ("Treble damages are a *form* of punitive damages."), cert. denied, 531 U.S. 1153 (2001).

b. The 1986 Amendments Vastly Increased The Frequency Of *Qui Tam* Suits

To encourage the filing of *qui tam* actions, the 1986 amendments also provided substantial new incentives to private relators who sue under the Act. *Schumer*, 520 U.S. at 949. Prior to 1986, no *qui tam* relator could maintain an FCA suit based upon "evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982); see also *Schumer*, 520 U.S. at 945. In addition, the bounties were smaller (between 10% and 25%), and the relator had no right to any minimum recovery. 31 U.S.C. §§ 3730(c)(1), 3730(c)(2) (1982).

After the 1986 amendments, relators can sue even on information already in the hands of the Federal Government. If the United States does not intervene in a lawsuit, relators are guaranteed a bounty of no less than 25%, and up to 30%, of the total recovery. 31 U.S.C. §§ 3730(c), 3730(d) (2000). Even if the United States chooses to intervene, the relator retains a role as a party in the litigation and must receive between 15% and 25% of the proceeds of the suit. *Ibid.* Together with the dramatic increase in the penalties imposed under the Act, these changes greatly enhanced relators' potential recovery and therefore increased their incentive to sue.

c. If Applied To Local Governmental Entities, The 1986 Amendments Would Prove Especially Burdensome

If Congress intended the 1986 amendments to encourage the filing of False Claims Act suits by private relators, it certainly succeeded. In 1987 only 33 relators filed *qui tam* FCA suits; by 1999, the annual total had grown to 481. See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, Appendix H, at H-1 (2d ed. 2002). As a result, between 1986 and 2001 *qui tam* relators received a whopping $745 million in bounties under the FCA. *Ibid.*

The reasons for this expansion are obvious. By raising and guaranteeing the relators' percentage recovery, increasing the minimum penalty for every false claim, and adding the punitive treble-damages provision, Congress gave relators an enormous financial incentive to file *qui tam* suits. Relators have responded, cashing in for almost three-quarters of a billion dollars since the enactment of the amendments. With a False Claims Act plaintiff's bar now well-established and soliciting business, and with the Federal Government's spending continuing to grow, the number of *qui tam* suits filed in the future cannot be expected to diminish.

As this Court has previously noted, moreover, "a relator's interests and the [Federal] Government's do not necessarily coincide." *Schumer*, 520 U.S. at 949 n.5. FCA litigation conducted by the United States is grounded in the pursuit of the public good, and tempered by ongoing attention to ensuring that the suit remains in the federal interest. See U.S. ATTORNEY'S MANUAL, § 9-27.220-230. By contrast, *qui tam* relators "are motivated primarily by prospects of monetary reward rather than the public good." *Schumer*, 520 U.S. at 949. As this Court has recognized, *qui tam* relators are simply "private persons acting * * * under the strong stimulus of personal ill will or the hope of gain." *Schumer*, 520 U.S. at 949 (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n.5 (1943)).

The differing interests of the United States and private relators would have significant consequences if local governments were subject to suit under the FCA. Given the important interests of federalism and comity, the United States owes local governmental entities its careful consideration before it pursues *any* litigation against them.[5] It

[5] This point was made forcefully by Judge Weinstein in his dissenting opinion (subsequently vindicated by this Court) from the Second Circuit's decision in *Stevens*: "Entrusting the United States' decision to sue a state to a *qui tam* relator, with an incentive to sue even when the merits of the suit are questionable, and even though its prosecution harms the interests of the federal government, the state and the ongoing relationship between the two sovereigns, effectively short circuits the moderating processes afforded congresspersons and state and federal administrators." *United States ex rel. Stevens* v. *Vermont Agency of Natural Res.*, 162 F.3d 195, 225 (2d Cir. 1998), rev'd, 529 U.S. 765 (2000). Although Judge Weinstein's analysis concerned the effect of *qui tam* suits upon States, he expressly noted that the congressional communication disrupted by the FCA "is often, most importantly, conducted on behalf of state *and municipal governments and their officials*." *Id.* at 226 (emphasis added); see generally *id.* at 225-229.

must consider whether the overall benefits of bringing suit justify the often astronomical litigation expenses that the municipality must bear in defending against such suits, not to mention the risk that its citizens will suffer through decreased services or that taxpayers will be forced to pay higher taxes. Those interests are only compounded when the litigation in question will result in punitive damages. Local governmental entities therefore deserve—and presumably would receive if they were subject to FCA suits—the fully informed judgment and discretion of professional prosecutors.

The rational *qui tam* relator, however, would ignore many of the factors that the Federal Government would consider in deciding whether to pursue litigation against a municipality. The relator would not face the political restraints that would rein in the Federal Government's litigation against a local government. The relator, who may not even reside in the community subject to the suit, might not be concerned about the impact her suit would have on the community or its citizens. These factors would reduce the chances of reaching an early resolution, and would increase the likelihood of expensive and protracted litigation.

The severity of the FCA's regime of punitive damages and the jeopardy to which it would expose local governments provide compelling reasons for this Court to require an

exceptionally clear statement from Congress that it intended to subject governmental entities to this "new cause of action" and all of its attendant burdens and dangers. *Schumer*, 520 U.S. at 950. As we next show, however, the 1986 FCA amendments contain not even the slightest hint that Congress intended to subject local governmental entities to punitive liability.

2. The 1986 Amendments Contain No Clear Statement Of Intent To Strip Local Governmental Entities Of Their Immunity From Punitive Damages

Because the 1986 amendments created a "new cause of action" implementing a punitive damages scheme (*Schumer*, 520 U.S. at 950), Congress understood that it was required to provide a clear and unambiguous statement in the statute if it intended to subject local governmental entities to punitive damages under the FCA. The 1986 amendments contain no such clear statement. See Pub. L. No. 99-562, 100 Stat. 3153.

The proper analysis in this case closely tracks the analysis employed by this Court in *Stevens*. In *Stevens*, the Court evaluated whether States were subject to suit under the False Claims Act. In determining whether States were "person[s]" within the meaning of that term as used by Congress in 1863, the Court applied the "longstanding interpretive presumption that 'person' does not include the sovereign." *Stevens*, 529 U.S. at 780. After reviewing the text of the FCA, the Court concluded that "the text of the original statute does less than nothing to overcome the presumption that States are *not* covered." *Id.* at 782. With no textual evidence to rebut the presumption, the Court held that States were not proper defendants under the FCA. See *id.* at 787-788.

The same logic controls here. In this case, the Court begins with the presumption, established in *City of Newport*, that local governmental entities are not subject to punitive

damages. Like the presumption that States are not "persons," the presumption of municipal immunity from punitive damages "is, of course, not a 'hard and fast rule of exclusion.'" *Stevens*, 529 U.S. at 781 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604-605 (1941)). But, also like the presumption that States are not "persons," the presumption of municipal immunity from punitive damages "may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Ibid.* In this case there is no clear statement of statutory intent to subject local governments to punitive damages, either in the 1863 enactment or in the 1986 amendments. As in *Stevens*, then, the FCA "does less than nothing to overcome the presumption." 529 U.S. at 782.

Indeed, *Stevens* provides additional grounds for upholding municipal immunity from the punitive damages imposed under the FCA. In support of its holding that States were not subject to suit under the FCA, the Court noted that the punitive damages made available by the 1986 amendments to the FCA "would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 784-785 (citing *City of Newport*, 453 U.S. at 262-263). Obviously, the Court did not find in the 1986 amendments any statement of congressional intent to abrogate governmental immunity from punitive damages. *Stevens* thus compels reversal of the judgment below.

The Seventh Circuit did not purport to find any clear statement of congressional intent to subject local governmental entities to punitive damages in the 1986 amendments. Instead, the court of appeals inverted the correct analysis. Proceeding on its mistaken understanding (Pet. App. 8a) that municipalities were presumptively "persons" at the time the original FCA was enacted in 1863 (which we refute at pages 9-11, *supra*), the court performed a

cursory search for a clear statement that municipalities had been *exempted* from the more onerous sanctions that Congress enacted in 1986. See, *e.g.*, Pet. App. 17a ("In enacting the 1986 changes to the statute, * * * Congress did not indicate in any way that it intended to exempt municipal entities from the scope of the statute."). Even if municipalities *had* been subject to the original Act's remedial sanctions, a clear and affirmative statement of intent to impose the new punitive regime on municipalities would have been necessary. Because municipalities were *not* clearly subject even to the 1863 Act, however, the Seventh Circuit's inference from congressional silence of the intention to impose *punitive* damages under the beefed-up Act was wholly unreasonable.

It is a sign of the superficiality of the Seventh Circuit's analysis that it purported (Pet. App. 10a) to find vindication of its conclusion in a snippet of the legislative history of the FCA amendments. The court of appeals cited a 1986 Senate Report defining "person" to include "all parties who may submit false claims * * * [including] States and political subdivisions thereof." S. Rep. No. 99-345, at 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266.

Of course, this Court had previously dismissed that exact passage as "setting forth a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Stevens*, 529 U.S. at 783 n.12. Undaunted by this Court's analysis, the Seventh Circuit proceeded to place near-controlling emphasis on that sentence in the Senate Report, based on its subjective confidence that it understood all of the reasons why the sentence was "erroneous." Pet. App. 10a-11a n.8. But the court missed the point of this Court's warning—the views of a Senate Committee 123 years following the enactment of a statute provide poor insight into the intent of the Congress more than a century before.

This Court explained in *Stevens* that legislative history alone "would be unequal to the task" of providing a sufficiently clear statement of intent to override a presumption. 529 U.S. at 783 n.12. In fact, the legislative history of the 1986 amendments supports the conclusion that Congress understood municipalities to retain their common law immunity from punitive damages. The Congressional Budget Office's report of the cost estimate of the False Claims Amendment Act stated that "[t]hese amendments are expected to involve no significant costs to * * * state or local governments." S. Rep. No. 99-345, at 37 (1986), reprinted in 1986 U.S.C.C.A.N. 5266. Certainly, the higher damages available under the Act, as well as the increased risk of lawsuits under the 1986 amendments, would represent a "significant cost[]" to any entity subject to the FCA. *Ibid.* That no such cost was anticipated for municipalities weighs against a finding that Congress intended to abrogate their immunity from punitive damages under the FCA.

At the end of the day, the 1986 FCA amendments simply do not contain any clear statement that Congress intended to displace the traditional common law immunity and subject local governmental entities to punitive damages under the FCA. Significantly, even the court below did not purport to find a sufficiently clear statement in the FCA of congressional intent to displace immunity. Instead, it subjected Cook County to the FCA's punitive damage scheme only by inverting the proper analytical framework and placing the burden on Cook County to produce textual statutory evidence that it was immune.

Under the correct analysis—one similar to that conducted by this Court in *City of Newport* and *Stevens*—it is clear that neither the original 1863 FCA nor the 1986 FCA amendments contain a clear statement by Congress that local governmental entities are to be stripped of their common law immunity and subjected to the FCA punitive damages regime. This Court

should therefore reverse the judgment of the Seventh Circuit and hold that local governmental entities are immune from suits brought under the False Claims Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS

Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, PH.D.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS, CONTRA COSTA REGIONAL MEDICAL CENTER, GRADY HEALTH SYSTEM, HALIFAX HOSPITAL MEDICAL CENTER, HARBORVIEW MEDICAL CENTER, HURLEY MEDICAL CENTER, THE HEALTH AND HOSPITALS CORPORTATION OF MARION COUNTY, JACKSON MEMORIAL HEALTH SYSTEM, MEMORIAL HEALTHCARE SYSTEM, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, PARKLAND HEALTH AND HOSPITAL SYSTEM, RIVERSIDE COUNTY REGIONAL MEDICAL CENTER AND SANTA CLARA VALLEY HEALTH & HOSPITAL SYSTEM IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(a) of the Rules of this Court on written consent of all parties filed with the Clerk of this Court concurrently with this brief, the National Association of Public Hospitals and Health Systems ("NAPH"), Contra Costa Regional Medical Center, Grady Health System, Halifax Hospital Medical Center, Harborview Medical Center, Hurley Medical Center, Health and Hospital Corporation of Marion County, Jackson Memorial Health System, Memorial Health Care System, New York City Health and Hospitals Corporation, Parkland Health and Hospital System, Riverside County Regional Medical Center and Santa Clara Valley Health & Hospital System, respectfully submit this brief *amici curiae* in support of Petitioner on writ of certiorari to the United States Court of Appeals for the Seventh Circuit [hereinafter "the Seventh Circuit"].[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae consist of NAPH, a national association of safety net hospitals and health systems, and twelve of its members, all of which are owned or operated by local governments (*i.e.*, county or city hospital authority, hospital district or public benefit corporation). NAPH represents over 100 providers that deliver safety net health care services, predominantly in large metropolitan areas. A substantial majority of NAPH members are owned or operated by state or local governments, or have significant long-standing ties to governmental entities. Thus, NAPH

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no person or entity other than *amici*, their members, or their counsel have made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

and its members have a significant interest in whether the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3731 may be applied to local governmental entities.

Public hospitals and health systems that are owned or operated by local governmental entities (hereinafter "local public hospitals") fill a critically important role in our society. These providers render a disproportionate share of inpatient and outpatient medical care in their communities to low income patients and otherwise vulnerable populations. These populations typically include persons who are Medicaid-eligible or without health insurance, many of whom suffer from chronic diseases such as AIDS, asthma, tuberculosis and diabetes. In carrying out their public mission, these providers serve as the primary safety net health care facilities in their communities.

To a large extent, most other hospitals generally are unable or unwilling to guarantee access to care for all, regardless of ability to pay, in the same manner as local public hospitals. Market forces and the realities of health care economics simply do not permit most other hospitals to provide significant amounts of care that is not reimbursed by public or private insurers (sometimes called "uncompensated care"). Therefore, local public hospitals fill this void, providing a public good – guaranteed access to care – that the free market does not support. In illustration, just 78 NAPH members provided over 20 percent of all of the uncompensated care across the United States in 2000, averaging 24 percent versus six percent of total costs for the rest of the industry. *See* Nat'l Ass'n of Pub. Hosp. & Health Sys., *America's Safety Net Hospitals and Health Systems, 2000* (2002) at vi [hereinafter *America's Safety Net*].

Local public hospitals also play a vital role in serving their communities at large, not just the poor and uninsured. They provide high-level specialty services such as emergency and trauma care, burn care, emergency psychiatric care and neonatal intensive care to their

surrounding communities – uninsured and insured alike. These specialty services are provided as part of the local public hospital's mission, despite their high cost and extremely low reimbursement rates. *Id.* at 6. Local public hospitals also are an integral part of this nation's front line response to emergencies, natural disasters, major industrial epidemics and acts of bioterrorism. As other health care providers do not generally have all of these capabilities, local public hospitals must fill a unique niche in our communities.

Given their public mission, local public hospitals are dependent on funding from federal, state and local governments. NAPH member data indicates that on average, they provide over 80 percent of services to Medicare, Medicaid or uninsured patients. *Id.* at 2. NAPH members also rely on federal, state and local governments for approximately 75 percent of their gross patient revenues. *Id.* at 3.

One clear consequence of receiving this funding from federal, state and local governments is that local public hospitals are subject to a myriad of federal, state and local laws governing submission of claims for reimbursement and related issues, leading to the question at hand - whether local public hospitals are subject to liability for punitive damages under the FCA. If local public hospitals are found liable under the FCA, punitive damages would threaten their ability to render essential, yet underreimbursed, health care services in their communities.

Therefore, *amici* have a significant interest in the Court's consideration of the decision below, *United States ex rel. Chandler v. Cook County, Ill.*, 277 F.3d 969 (7th Cir. 2002), *cert. granted*, 122 S. Ct. 2657 (2002), that a local public hospital is subject to liability under the FCA.

SUMMARY OF THE ARGUMENT

Amici submit that in the decision below, *Chandler*, 277 F.3d 969, the lower court erroneously held that local governmental agencies are subject to liability under the FCA. This decision squarely conflicts with previous opinions of this Court, as well as decisions rendered by other circuit courts of appeal and district courts, that preclude the application of the FCA's punitive damages to local governmental entities. Accordingly, *amici* agree with the arguments advanced by the Petitioner and respectfully request that this Court reverse the Seventh Circuit's decision.

Local governmental entities have been the subject of a long-established common law presumption of immunity from punitive damages. This immunity applies unless there is express statutory authority to rebut such presumption. *See City of Newport*, 453 U.S. 247. The application of this immunity, however, must also be compatible with the purpose of the statute in question and general principles of public policy. *Id.*

The presumption of immunity for local governmental entities applies to the FCA because there is no clear evidence that Congress intended to abrogate this presumption within the statutory language or the legislative history of the FCA. At the time of the FCA's enactment in 1863, Congress did not presume to include local governmental entities within the purview of the FCA. The FCA remained largely unchanged until its amendment in 1986, when Congress altered the nature of the FCA's damages regime from remedial to punitive. Although Congress was on notice that municipal immunity would be assumed if Congress did not speak clearly, Congress provided no amendment that expressly abrogates state or local governmental immunity from punitive damages. Thus, the language and legislative history of the FCA provides no

basis upon which to rebut the presumption that local governmental entities are immune from its punitive damages.

Public policy considerations also require immunity from punitive damages for local governmental entities. Imposing punitive damages upon a local governmental entity results in either an increased tax burden or a diminution of services for the individuals served by this entity. The application of the FCA to local governmental entities is particularly unwarranted because liability under the FCA mandates the imposition of punitive damages, without any alternative. Moreover, an FCA action may be prosecuted by a private relator on behalf of the United States even when the United States has declined to intervene. A private relator, if successful, may reap a windfall at the expense of the public.

Amici file this brief to emphasize the nature of one class of local government services – safety net health care services provided by local public hospitals – that are at risk as a result of the decision below. In the circumstance of local public hospitals, punitive damages may cause irreparable harm in the form of significantly reduced access to care for community members, often the poor and uninsured, who routinely turn to these facilities when they are sick or injured. Application of punitive damages in this and similar cases imposes a hardship upon communities at large that far outweighs any deterrent effect. Such public policy considerations require the application of immunity to local public hospitals from the FCA's punitive damages.

For these reasons, *amici* respectfully request that this Court reverse the decision of the Seventh Circuit.

ARGUMENT

I. The FCA Is Not Applicable to Local Public Hospitals Because There Is No Clear Congressional Intent That the FCA or Its Punitive Damages Regime Be Applied to Local Governments

In *City of Newport,* 453 U.S. 247, the Court held that local governmental entities are entitled to immunity from punitive damages pursuant to a longstanding common law presumption. Absent express clear congressional intent, such immunity applies to local governmental entities unless "public policy considerations dictate a contrary result." *Id.* at 266.

Congress has been well aware of the common law presumption against the application of punitive damages upon local governments from the time of the enactment of the FCA in 1863 to the present.[2] Despite this knowledge, there is no evidence of any congressional intent to rebut this presumption within the FCA or its legislative history. Accordingly, this Court's application of the historical presumption against the imposition of punitive damages upon local governments, as well as its understanding of the public policy interest served by this immunity, leads inevitably to the conclusion that local governmental entities such as local public hospitals should be exempt from liability for punitive damages under the FCA.

A. Punitive Damages May Not Be Applied to Local Governments

In *City of Newport*, the Court explores the history of judicial application of punitive damages in the mid-1800s –

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[2] The local governmental immunity presumption is applicable to the FCA because this Court has established that the FCA is a punitive statute. *See Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

a time contemporaneous to the period in which the FCA was first enacted – and concludes that "the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation." *Id.* at 260 (citations omitted). "Courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Id.* at 263.

This common law presumption of municipal immunity from punitive damages has remained virtually unchanged since its inception in the mid-1800s. Indeed, the Court has explicitly recognized that this presumption continues to apply to local governments facing punitive damages claims under federal statutes in the present day. *Id.*, at 261, n.21 ("the general rule today is that no punitive damages are allowed [against a local governmental entity] unless expressly authorized by statute"); *see also Pierson v. Ray*, 386 U.S. 547, 555 (1967) (holding that Congress must clearly act to abolish municipal immunity from punitive damages). Indeed, no court of appeals has permitted an award of punitive damages against a local government without finding express statutory authority for such an award. *See Schultzen v. Woodbury Cent. Cmty. Sch. Dist.*, 187 F.Supp.2d 1099, 1127 (N.D. Iowa 2002) (citations omitted).

In order to apply punitive damages to local governmental entities, courts must first determine that Congress has clearly intended to abrogate local governmental immunity within the language of the statute. *City of Newport*, 753 U.S. 247. Second, courts must consider whether the application of local governmental immunity is consistent with the general purpose of the statute and relevant public policy considerations. *Id.* at 266. Without clear evidence to the contrary, municipal immunity from punitive damages must apply.

The Court has recognized that the rationale of *City of Newport* should be applied to federal laws designed to benefit the citizens of the United States, as "we are concerned with imposing punitive damages on taxpayers under any circumstances." *See Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. at 785. Moreover, courts have applied the municipal immunity presumption against punitive damages to claims under a number of different federal statutes. In illustration, municipal immunity has been applied to claims arising under the Civil Rights Act, 42 U.S.C. § 1981. *See, e.g., Ferguson v. Joliet Mass Transit Dist.*, 526 F.Supp. 222 (N.D. Ill. 1981) ("the silence of Congress and the neutrality of the legislative history of section 1981 ... support a conclusion that the immunity of municipal corporations from punitive damages extends to suits under section 1981").

Courts have also extended this municipal immunity to Title II of the American with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, because these statutes "lack any indicia of Congress' intent to override the settled common law immunity of municipalities from punitive damages." *See e.g., Doe v. County of Centre*, 242 F.3d 437, 457 (3d Cir. 2001). Courts have also found the application of punitive damages upon local governments to be inappropriate under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. *See e.g., Raie v. City of Philadelphia*, 2001 WL 884707 (E.D. Pa. 2001); *McLaughin v. Rose Tree Media School District*, 1 F:Supp.2d 476, 483 (E.D. Pa. 1998). Similarly, municipalities have been held to be immune from punitive damages under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. *See e.g., Schultzen*, 187 F.Supp.2d at 1227.

Municipal immunity has also been extended beyond claims of violations of civil rights laws to other federal

statutes. For example, courts have applied municipal immunity to bar claims against local governmental entities under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968. *See e.g., Genty v. Resolution Trust Company*, 937 F.2d 899, 920 (3d Cir. 1991) (holding that "a civil RICO claim with its mandatory and punitive treble damages provision cannot be maintained against a municipality . . . absent Congress' declaration to the contrary"). The application of municipal immunity to RICO is especially analogous to the FCA because the mandatory punitive regime of both statutes requires the presumption of immunity unless there is clear statutory authority to the contrary.

Thus, the recognition of long-standing municipal immunity by the Court in *City of Newport* has been applied to protect local governments and their taxpaying communities from punitive damages under a number of different federal statutes. Accordingly, this precedent requires the extension of the presumption of municipal immunity to claims arising under the FCA.

B. Congress' Failure to Act Requires Immunity for Local Governments From Liability Under the FCA

As this Court has confirmed that the FCA is a punitive statute, *Stevens*, 529 U.S. at 784, the Court's reasoning in *City of Newport* is applicable to the FCA. Accordingly, local governmental entities are immune from liability under the FCA unless (i) Congress has expressly abrogated this immunity within the language of the FCA and (ii) the application of this immunity contradicts the purpose of the FCA or public policy considerations. *See City of Newport*, 453 U.S. 247.

The FCA imposes civil penalties on "any person" who presents a false claim to the government or conspires to allow a false claim to be submitted. 31 U.S.C. § 3729(a)(1).

However, upon enactment of the FCA, Congress failed to include a definition of "any person" who may be held liable under the FCA. *See Stevens*, 529 U.S. at 783. Moreover, analysis of subsequent amendments of the FCA reveals no evidence that Congress intended to apply the FCA to local governments or eviscerate the common law presumption against the imposition of punitive damages upon local governments.

1. Local governments are not "persons" under the FCA

The FCA was enacted in 1863 with the principal goal of combating massive fraud perpetrated by large private contractors during the Civil War. *Stevens*, 529 U.S. at 781. Specifically, the FCA was targeted at "any person in the land or naval forces of the United States, or in the militia in actual service of the United States. False Claims Act of Mar. 2, 1863, ch. 67 §§ 1, 3, 12 Stat. 696. The enactment of the FCA also followed "a series of sensational congressional investigations into the sale of provisions and munitions to the War Department." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Given this context, Congress could not have intended to apply the FCA local governments because it was likely private entities – not local governments – that sold military goods to the United States during the Civil War. *See United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 494 (5th Cir. 2001).

In the case below, the Seventh Circuit erroneously concluded that the FCA originally applied to local governments based on an analysis of the legislative history of a subsequently enacted statute and the court's understanding of the historical evolution of the meaning of "person" that occurred several years after the FCA was passed.

The Seventh Circuit begins its consideration of whether local governments were "persons" under the FCA by

concluding that in 1863, when the FCA was adopted, "both private and municipal corporations were presumptively included within the meaning of 'person.'" *Chandler*, 277 F.3d at 974 (citing *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89) (1978)). However, in *Monell*, the Court only addressed the intended meaning of "person" within section 1 of the Civil Rights Act of 1871 by examining its legislative history, in addition to other statutes that took effect years after the FCA was enacted in 1863. Such considerations are irrelevant to understanding Congress' intent to define "person" under the FCA.

For example, the *Monell* Court noted that by 1844, corporations were deemed to be persons. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 687 (1978) (citing *Louisville R. Co. v. Letson*, 2 How. 497, 558 (1844)). However, this presumption was limited to private corporations because Congress only extended the meaning of the term "person" to municipalities in 1871. *Id.* at 688 (citing Act of Feb. 25, 1871 2, 16 Stat. 431)) (emphasis added)("[i]n all acts *hereafter passed*...the word 'person' may extend and be applied to bodies politic and corporate...unless the context shows that such words were intended to be used in a more limited sense"). Thus, such reasoning does not apply to a determination of whether Congress intended the FCA to apply to local governmental entities. Municipalities were included within the term "person" seven years after the FCA was passed. Moreover, the passage of this 1871 legislation illustrates that the intended definition of "person" did not presume to include municipalities prior to 1871.

Thus, the Seventh's Circuit's reliance upon *Monell* does not provide adequate justification for applying the FCA to local governmental entities. *See Stevens*, 529 U.S. at 783, fn. 12. Unlike the legislative history of 42 U.S.C. § 1983 examined in *Monell*, the FCA provides no evidence of congressional intent to include local governments within its reach. Indeed, circumstances that subject local governments

to potential liability under the FCA have only developed in the latter twentieth century – with local governments receiving federal funding or acting as a government contractor. Thus, Congress in the late 1800's could not have imagined such an application. Conversely, civil rights legislation, by its nature, could reasonably have been applied to local governments. Thus, *Monell*'s reasoning provides no insight into the application of the FCA. Instead, a review of the FCA and its legislative history proves that there is no clear evidence that Congress intended local governments to be "persons" subject to liability.

2. Absence of congressional intent precludes the application of punitive damages under the FCA upon local governments

Even if there were some ambiguity as to whether Congress intended local governments to be included within the term "person" when the FCA was enacted in 1863, any such ambiguity is inadequate to overcome the presumption of local governmental immunity from punitive damages. *United States ex rel. Dunleavy v. County of Delaware, et al.*, 279 F.3d 219, 225 (3d Cir. 2002). As evidenced in the Court's interpretation of liability under 42 U.S.C. § 1983 in *Monell* and *Newport*, although local governments may be held liable for violations of a federal statute as a "person," they may not be subject to punitive damages if Congress did not expressly rebut this common law presumption. A review of the FCA and its legislative history of the FCA does not provide any clear evidence of such a rebuttal.

In 1986, Congress made the first significant amendments to the FCA since its enactment in 1863. Congress altered the FCA damages regime from double damages and a $2,000 penalty per false claim to treble damages and a $10,000 penalty per false claim. In making this change, Congress was well aware of the punitive nature of these newly available damages. *See Tex. Indus., Inc. v. Radcliff*

Materials, Inc., 451 U.S. 630, 639 (1981) ("the very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers"). More significantly, the FCA's punitive damages regime reflects a congressional intent to exclude local governments from the purview of the FCA. *Garibaldi*, 244 F.3d at 493.

Despite the Court's reiteration of municipal immunity in *City of Newport* five years before these amendments, Congress gave no clear indication that it anticipated that local governmental entities would be subject to the FCA's new punitive damages regime. Indeed, *City of Newport* and previous precedent gave Congress clear notice that it would be required to speak clearly to rebut the presumption against local governmental immunity from punitive damages. *See e.g., Pierson*, 386 U.S. 547; *City of Newport*, 453 U.S. 247. Nevertheless, Congress declined to include state or local governments within the definition of "any person" subject to liability under the FCA. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).[3]

The Seventh Circuit, however, heralds the 1986 amendments as further evidence that Congress intended to subject local governments to the FCA. In particular, the court references provisions and interpretive language added by amendments – the Civil Investigative Demand ("CID")

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[3] The Third Circuit explains:

> We find nothing on the face of the relevant portions of the FCA as originally enacted in 1863 or in its current form which evidences a clear indication on the part of Congress to subject local governments to punitive damages under the Act. The Act is utterly devoid of any specific intention to subject local governments to its strictures. This lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA.

Dunleavy, 279 F.3d at 224.

provision, a whistleblower statute and related committee reports. *Chandler*, 277 F.3d 969. But careful examination of these provisions and reports reveals no conclusive evidence of express congressional intent to impose the FCA's punitive damages upon local governmental entities.

The CID provision allows the Attorney General to issue a CID to "any person" with information relevant to the alleged false claim. 31 U.S.C. § 3733(a)(1) This provision defines "person" to include "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." *Id.* at § 3733(k)(1)(4). However, because this definition of "person" is "for purposes of [section 3733]" only, Congress did not intend to apply this definition to 31 U.S.C. § 3729(a) Indeed, this Court has determined that the presence of a reference to States within the definition of "person" in the CID provision and the absence of such a clear reference in section 3729 demonstrate that Congress did not expressly intend to subject States to liability under the FCA. *Stevens*, 529 U.S. at 784. In applying this same analysis to local governments, the CID provision does not provide any evidence that Congress intended to subject local governments to punitive damages under the FCA.

In adding a whistleblower provision, Congress sought to provide protection to private relators and their witnesses. *See* 31 U.S.C. § 3730(h). Although this provision does not include a definition of "person," the Seventh Circuit cites a related committee report that defines employers subject to the whistleblower provision to "include public as well as private sector entities" as evidence that Congress intended local governments to be subject to punitive damages under the FCA. *See Chandler*, 277 F.3d at 975 (citing S. Rep. 99-345 at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273).

This committee report only provides insight on a statutory provision separate and apart from section 3729(a)

of the FCA. Moreover, the report does not provide adequate evidence of congressional intent to impose the FCA's punitive damages upon local governments. *See Pierce v. Underwood*, 487 U.S. 552, 566 (1988) ("it is the function of the courts and not the legislature, much less a committee of one house of the legislature, to say what an enacted statute means"), *Wallace v. Christensen*, 802 F.2d 1539, 1560 (9th Cir. 1986) (*en banc*) (Kozinski J., concurring) ("committee reports that contradict statutory language or purport to explicate the meaning of applicability of particular statutory language can short circuit the legislative process, leading to results never approved by Congress or the President"). Thus, this congressional commentary cannot meet the test established in *City of Newport* of express abrogation of local governmental immunity from punitive damages.

In determining that punitive damages should apply to local governments under the FCA, the Seventh Circuit also relies upon a committee report that states that in the FCA "the term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." S.Rep. No. 99-562 at 8 (1986). This report, however, was attempting to interpret the application of the FCA at the time of its enactment. *See United States ex rel. Graber v. the City of New York*, 8 F. Supp.2d 343, 353 (S.D.N.Y. 1998). As post-enactment legislative history, this report cannot serve as a substitute for clear statutory language. *See id.* ("as a mere expression of one legislative chamber's view as to how the phrase should be interpreted, the passage in the report would be granted minimal, if any, weight in determining the meaning of [the FCA]"); *Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *Weinberger v. Rossi*, 456 U.S. 25 (1982) ("Post hoc statements of a congressional committee are not entitled to much weight").

Moreover, the Court has discredited this report, finding that the committee had an incorrect understanding of the meaning of the term "person" enacted some 123 years earlier. *Stevens*, 529 U.S. at 783, n.12. Thus, this report "cannot pass muster in light of the *Stevens* Court's express rejection of the pertinent 1986 legislative history as erroneous and of questionable value." *Dunleavy*, 279 F.3d at 225.

Ambiguous statements in committee reports and definitions of "persons" in unrelated statutory provisions do not constitute clear statements of intent to apply the FCA's punitive damages upon local governments. Thus, the presumption against imposing punitive damages on taxpayers must logically be applied to exempt local governments from liability under the FCA. The Third and Fifth Circuits have interpreted the Court's precedent in precisely this manner. *See Dunleavy*, 279 F.3d 219; *Garibaldi*, 244 F.3d 486. Many district courts have agreed. *See United States ex rel. Kinney v. Hennepin County Med. Ctr.*, 2001 U.S. Dist. LEXIS 10170 (D. Minn. Jan. 22, 2001); *United States ex rel. Honeywell v. San Francisco Housing Auth., et al.*, 2001 U.S. Dist. LEXIS 9743 (N.D. Cal. Jul. 12, 2001); *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp.2d 1092 (C.D. Cal. 2001); *United States ex rel. King v. Jackson County Hosp. Corp. of Mariana, Fl.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001).[4]

In stark contrast to the many courts that have considered this issue, the Seventh Circuit erroneously disregards this Court's precedent in *City of Newport* and *Stevens*, to arrive

[4] Other district courts have disagreed, thereby causing a split at the district court level. *See United States ex rel. Rosales v. San Francisco Hsg. Auth.*, 173 F. Supp. 2d 987 (N.D. Cal. 2001); *United States ex. rel. Giles v. Sardie*, 191 F.Supp.2d 1117 (C.D. Cal. 2000); *United States ex rel. R&R Ltd. P'ship v. Mass. Hsg. Fin. Agency*, 154 F. Supp. 2d 19 (D.D.C. 2001).

at the conclusion that a local public hospital is not immune from the FCA and its punitive damages. *Chandler*, 277 F.3d 969.

In light of the foregoing, *amici* respectfully request that this Court reverse the decision of the Seventh Circuit because the FCA and its legislative history provide no basis upon which to allow the imposition of punitive damages on local governmental entities under the FCA.

II. Local Governments Are Immune From the FCA Because the Imposition of Punitive Damages Would Harm the Public at Large and More Particularly Vulnerable Patient Populations and Taxpayers

A. Public Policy Considerations Preclude the Imposition of the FCA's Punitive Damages Upon Local Governments

As there is no evidence of clear congressional intent to eviscerate local governmental immunity from the FCA's punitive damages, the only issue left to consider is whether the application of this immunity is consistent with the purpose of the FCA and public policy considerations.

Policy concerns provide no justification for imposing punitive damages on local governmental entities under the FCA. In fact, policy concerns mitigate against such liability. Punitive damages have two major purposes – punishment and deterrence. Neither of these purposes are fulfilled with the application of punitive damages under the FCA.

Historically, courts viewed punitive damages against local governmental entities as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. *City of Newport*, 453 U.S. at 263. In explaining the common law tradition of protecting local governments from liability for punitive damages, the Court states:

> Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those [punitive damages] which the plaintiff has recovered . . . cannot, in our opinion, be sanctioned by this court, *as they are to be borne by widows, orphans, aged men and women and strangers,* who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, canno. be bound beyond that amount, which will be sufficient for her indemnification.

Id. at 677 (citing *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 674 (La. 1846)) (emphasis added).

This Court has also determined that punitive damages do not compensate the injured party, but instead are intended to punish the wrongdoer and deter similar actions in the future. *Id.* at 266-67. Indeed, the cost associated with such punitive damages "may be very real," "imposing strain on local treasuries and therefore on services available to the public at large." *Id.* at 270-71. "Neither reason nor justice" supports imposing such punishment on blameless or unknowing taxpayers of a local government, who would bear the burden of punitive damages through reduced services or higher taxes. *Id.* at 267. Thus, subjecting local governmental entities to punitive damages does not advance the purpose of the damages award because those who will pay the damages are not those that should be punished.

The *Garibaldi* court addresses how the imposition of punitive damages contradicts public policy considerations.

> Imposing punitive damages on a local government in favor of the federal government is especially problematic. Requiring such a transfer payment would reflect a judgment by Congress that denying school children of Orleans Parish needed services, or requiring the taxpayers…to pay higher taxes, is justified in the light of the relatively minor benefit to the federal treasury."

Garibaldi, 244 F.3d at 492.

In contrast, the Seventh Circuit's contrary conclusion defies reason.

> Presumably any ill-gotten gains from the federal government produce more services or lower taxes. Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit.

Chandler, 277 F.3d at 978. The court's faulty logic undermines its own argument. Any "unjust" benefit that local taxpayers have arguably received is the amount of the claim paid to which the public entity was not entitled. The unjust benefit is thereby fully returned when the federal government is compensated for its losses. In contrast, the FCA's treble damages and penalties are purely punitive – they do not represent "ill-gotten gains" from which local citizens have benefited.

Any minimal deterrent effect from the imposition of FCA punitive damages upon local governments will be severely outweighed by public harm. Because it is not the taxpayers or patients who have committed the wrong, subjecting them to punitive damages will not deter future

wrongful action. *See City of Newport*, 453 U.S. at 268 ("it is far from clear that municipal officials . . . would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality").

Finally, there is no reason why a presumption of municipal immunity would undermine the purpose of the FCA. *See Garibaldi*, 244 F.3d at 494-45. (citations omitted) ("even if one assumes that states commit a good deal of fraud against the federal government, it cannot be seriously argued that the very purpose of the [False Claims] Act would be thwarted if states were not liable under the Act. . . . This conclusion is as applicable to local governments as it is to states"). In fact, placing extra burdens on taxpayers is directly contrary to the FCA's goals of reducing taxpayer burdens by preventing fraud on the government.

Moreover, because the FCA *mandates* treble damages, it is by its construction, an inappropriate punishment of local governments, resulting in detrimental harm to the public. In contrast, when the application of punitive damages is *discretionary*, the court or fact finder may look to common law principles to weigh such factors and determine whether punitive damages are indeed appropriate. Such factors may include: 1) whether the award was excessive or inadequate, 2) the degree of reprehensibility of the defendant's conduct, 3) the financial position of the defendant, and 4) the cost of litigation. *See Pacific Mutual Life Insur. Co. v. Haslip, et al.*, 499 U.S. 1, 21 (1991). This process allows for the necessary balancing of the benefit to the plaintiff and the need for deterrence against the cost imposed upon the blameless, which in the case of local public hospitals, are the taxpayers, vulnerable patient populations and communities at large. The FCA provides no such opportunity to consider the equities of each case in awarding punitive damages. This absence of alternatives provides more reason why, absent clear congressional intent,

immunity should be applied to local governmental entities under the FCA.

Therefore, public policy considerations preclude the application of the FCA to local governmental entities. As the FCA allows for the use of alternative mechanisms to ensure that local governments comply with federal law, such punishment is not required to make the government whole. *See* 31 U.S.C. § 3930(D)(5). Given these potential alternatives, the FCA's punitive damages regime should not be applied to these entities because such an award threatens to severely punish the innocent in order to benefit of a single relator.

B. Imposition of Punitive Damages Upon Local Public Hospitals Will Truly Punish Vulnerable Patient Populations and Taxpayers

Public policy considerations are particularly persuasive in the context of local public hospitals providing health services to entire communities, including their underserved populations. Harm to members of communities served by local public hospitals will be certain and widespread should those hospitals continue to face FCA litigation and punitive damages. Because local public hospitals simply do not have disposable resources to pay for such additional costs, FCA liability will inevitably result in a reduction in services.

For years, local public hospitals have teetered on the brink of financial viability. Now for the first time in five years, the average local public hospital margin has plummeted into negative digits. In its most recent annual survey of member hospitals, NAPH reports that almost 50 percent of its members experienced negative margins in 2000, as compared to less than 33 percent in 1996. *America's Safety Net* at 1. In other words, these public hospitals' expenses exceed all of their revenue sources. In 2000, on average, NAPH members had a negative margin of one percent, down from an average positive margin of 2.6

percent in 1996. *Id.* In contrast, according to the American Hospital Association, the average margin for hospitals in the industry was 4.6 percent in 2000. *Id.* Many factors account for these losses, including significant reductions in Medicare and Medicaid payments, a rise in the number of uninsured, personnel shortages and the rising cost of pharmaceuticals. *Id.* at 2.

Thus, when faced with the imposition of treble damages and penalties, local public hospitals have no disposable resources to cover these costs. They must either turn to local taxpayers for additional funding or free up current funds by reducing services. In either case, the burden of FCA liability will be borne by the innocent – taxpayers and/or patient populations.

The mission of local public hospitals is to provide access to vital health care services to all regardless of ability to pay. Such guaranteed access is particularly important in this time of a nation-wide rise in the number of uninsured. *Id.* at 11. In the face of reduced reimbursement from private and government sources, private providers are less willing or able to serve the uninsured. Local public hospitals therefore are assuming an increasingly greater share of this burden. *Id.* This trend is evident in the high percentage of inpatient discharges and outpatient visits by the uninsured in 2000 – on average 27 and 43 percent for NAPH members respectively. *Id.* at 21, 23.[5] Local public hospitals are thus an irreplaceable component of the health care system in this country because they serve those with nowhere else to turn.

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[5] For example, 27 percent of inpatient discharges and 28 percent of outpatient visits were of uninsured individuals at Contra Costa Regional Medical Center; 32 and 55 percent at the Grady Health System; 49 and 58 percent at Jackson Memorial Hospital; 27 and 46 percent at the Health and Hospital Corporation of Marion County; 34 and 58 percent at Parkland Health and Hospital System; and 46 and 47 percent at Riverside County Regional Medical Center. *Id.* at 20-23.

Serving the poor and uninsured is not the only crucial role filled by local public hospitals in their communities. Local public hospitals are also often the primary providers of highly-specialized and extremely expensive services, upon which entire communities rely, such as emergency and trauma care, burn care, pediatric and neonatal intensive care, HIV/AIDS treatment, and psychiatric care. For example, in 2000, NAPH members represented only 16 percent of all hospital beds in the areas they serve, but provided 52 percent of all burn care beds; 26 percent of all pediatric intensive care unit beds; 25 percent of all neonatal intensive care beds; 40 percent of all Level I trauma centers; and handled 22 percent of the emergency department volume. *Id.* at 6. These services are not readily available at all hospitals because they are so costly to provide and because they are often severely underreimbursed. In accordance with the public hospital mission, providing such services is a "public good," which is funded in part through local taxpayer support because the market itself does not always ensure adequate access.

Local public hospitals also typically serve as the backbone of community disaster preparedness efforts, which have become particularly important in recent months due to increased concern about threats of biological, chemical or nuclear terrorism. These hospitals are often the only facilities in their communities with the capacity to prepare for and respond to mass casualty attacks. *See, e.g.,* Nat'l Ass'n of Pub. Hosp. & Health Sys., *What Are the Basic Components of a Sound Hospital Emergency Preparedness Program?* (2000). Such emergency preparedness requires training, stockpiling supplies and drugs, purchasing specialized equipment and coordinating with local, state and national public health officials. Local public hospitals also must be ready to respond to other types of public health emergencies, such as natural disasters, urban riots and airplane and train accidents. *Id.* Local communities and

indeed the nation as a whole have come to rely on local public hospitals to assume these critical responsibilities. Yet these entities do so with very little financial support.

Finally, local public hospitals provide other types of services to an extent not typically provided by private hospitals. These services are critical to enable vulnerable populations to access our health care system. For example, local public hospitals provide intensive translation and interpretation services for patients with limited or no English proficiency. NAPH member Hennepin County Medical Center, for example, meets the needs of its immigrant patients by employing more than 50 interpreters proficient in 20 different languages. *See* Nat'l Ass'n of Pub. Hosp. & Health Sys., *The Safety Net*, Vol. 15, n.2, 1, 26 (Spring 2002). Other such "enabling services" include child care, social services, transportation and financial counseling. There is typically no direct reimbursement for these essential services.

Given the manner in which they serve their communities, local public hospitals are operating under significant financial constraints. Uncompensated care accounted for 24 percent of total costs for NAPH hospitals as a whole, or approximately $4.8 billion in 2000. In comparison, uncompensated care costs were at six percent across the entire hospital industry. *America's Safety Net* at vi, 25.[6]

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[6] This is evidenced by the levels of uncompensated care costs borne by *amici*. In 2000, Contra Costa Regional Medical Center had $47 million (24 percent of its total costs); Grady Health System had $222 million (44 percent of its total costs); Jackson Memorial Hospital had $239 million (30% of its total costs); the Health and Hospital Corporation of Marion County had $100 million (37 percent of its total costs); Parkland Health and Hospital System had $230 million (40 percent of its total costs); Riverside County Regional Medical Center had $55 million (31 percent of its total costs). *Id.* at 24-25.

The foregoing strongly illustrates why public policy considerations preclude the application of punitive damages to local public hospitals under the FCA. Where the margins of these public hospitals may be negative, with no capacity to absorb significant new costs, the imposition of punitive damages will jeopardize the health of local communities – possibly on a massive scale. Such a potential result, combined with the absence of any clear congressional intent to rebut the presumption of municipal immunity, requires a conclusion that the FCA punitive damage regime may not be imposed upon local public hospitals.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *EX REL.* JANET CHANDLER, PH.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF COUNTY OF ORANGE, CALIFORNIA; COUNTY OF SAN DIEGO, CALIFORNIA; AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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This brief is filed on behalf of the counties of Orange and San Diego, California, and the California State Association of Counties, as amici curiae in support of petitioner, with the written consent of the parties.[1]

INTEREST OF AMICI CURIAE

The amici curiae are, or represent, county-level political subdivisions of the State of California. Each county is a recipient of federal funds, whether directly or through the State, for the administration and implementation of countless essential public services and programs. Amici are concerned that the Seventh Circuit's opinion in this case, *see United States ex rel. Chandler v. Cook County, Ill.*, 277 F.3d 969 (7th Cir. 2002), if affirmed by this Court, may put those programs at significant risk, and wrongly penalize the very local taxpayers who are the intended beneficiaries of these federal funds.

The County of Orange is a political subdivision of the State of California, *see* Cal. Const. art. XI, § 1, and was established in 1889, *see* Cal. Stats. 1889, at 123. It receives federal funds for a variety of purposes, including health care, education, and a variety of other vital functions. One of the divisions of the county that receives and administers federal funds is the county Health Care Agency ("OCHCA"). OCHCA receives federal funds directly through the Medicare program and indirectly through the Medicaid program (which provides funds to the state, which in turn provides them to local government entities).

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than *amici curiae* made any monetary contribution to its preparation or submission.

The County of San Diego is a political subdivision of the State of California, *see* Cal. Const. art. XI, § 1, and was one of the first counties established in the State, *see* Cal. Stats. 1850, ch. 15, at 58 (Feb. 18. 1850). It administers numerous essential local programs and services that receive federal funds.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties, including both Orange and San Diego Counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The False Claims Act ("FCA" or "Act") subjects to liability under its provisions "[a]ny person" who, *inter alia*, knowingly submits a false or fraudulent claim for payment to the United States. 31 U.S.C. § 3729. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that the term "person" – which is not explicitly defined in the statute – does not encompass States. The question in this case is whether the same term encompasses *local* government entities, such as petitioner Cook County, Illinois and the amici California local government entities. The court of appeals in this case answered that question in the affirmative, distinguishing *Stevens* on the basis of what the court of appeals deemed its "central holding": "states are not within the FCA's definition of 'person' because of the 'longstanding interpretive presumption that "person" does not include the sovereign.'" *Chandler*, 277

F.3d at 980 (quoting *Stevens*, 529 U.S. at 780). Believing that this presumption "cuts the other way for municipalities," *id.*, the court of appeals refused to accept any aspect of *Stevens* as governing here, *see id.* at 981 ("The rationale of *Stevens* simply cannot support the interpretation that Cook County wishes to place upon it.").

That conclusion is wrong in general and in all its particulars. There is no categorical presumption that local government entities are statutory "persons" unless Congress says otherwise, and even if there were, *Stevens* does not in fact pivot narrowly on the opposite presumption that States are *not* "persons." To the contrary, the Court in *Stevens* found States to be outside the term "persons" for additional, independent reasons based in the text, structure, and history of the Act, as well as in the distinct presumption that States are immune from the kind of punitive damages liability available under the statute. All of those reasons apply equally to local government entities.

The applicability of *Stevens* to such entities is also implicitly demonstrated by the court of appeals' concession that the FCA necessarily excludes local government entities when they are acting as "arms of the state itself." *Chandler*, 277 F.3d at 975 n.8. Given the intensely fact- and local-law specific nature of the arm of the state inquiry, that rule not only would mean that some local government entities within a State are outside the scope of the Act, while others are not; it would also mean that even a single agency might be subject to liability under the Act for some programs and not for others, or perhaps even for the use of some funds but not for others within the same program. The much more sensible rule would treat all local government entities equally under the statute. And since it is *at least* clear that such entities must be excluded when acting as arms of the state, the right result is to exclude them altogether.

Finally, amici are compelled to emphasize that the statutory meaning of "person" – whether it encompasses State and local government entities, that is – does not change with the status of the plaintiff, despite suggestions (but not yet holdings) to the contrary in certain opinions. A local government entity that is not a "person" when a private relator sues does not somehow transform into a "person" once the United States decides to enter the case. Nor is it a "person" just because it is the United States that sues initially. No plausible reading of the statute's text could confer such simultaneously contradictory meanings on a single term, and this Court should make that simple point clear so that the time and resources of courts and litigants are not diverted down such a blind alley.

ARGUMENT

This Court in *Stevens* held that the False Claims Act does not include States within the undefined statutory "person[s]" subject to liability under its provisions. The question in this case is whether local government entities, too, are excluded from the ambit of the statute. The answer to that question is yes – and the answer is the same whether the active plaintiff is a private relator, the United States, or both.

A. The Analysis In *Stevens* Applies Equally To Local Government Entities

This Court in *Stevens* rested its conclusion that States are outside the scope of the "person[s]" covered by the FCA on several grounds. First, the Court observed, there is the general presumption that States are not statutory "persons" in congressional acts unless Congress clearly says so. Second, the text of the Act supports the conclusion that States are not persons. Third, the statutory history points in the same direction. Fourth, and finally, the presumption that punitive damages are not applicable to government entities supports the

same result. Contrary to the conclusion of the court of appeals in this case, all of these reasons equally compel the conclusion that local entities are not "person[s]" under the Act.

1. *The Presumption Against Imposing Liability On Government Entities*

The court of appeals correctly observed that the *Stevens* Court construed the FCA partly on the basis of an interpretive presumption that "states, as sovereigns, are not included within the term 'person.'" 277 F.3d at 980. The court of appeals incorrectly concluded, however, that this presumption has no application to local government entities. *Id.*

The court of appeals rested its view on the ground that the presumption operative in *Stevens* was one "applied to protect the states because of their dignity as sovereigns within our system of federalism." *Id.* "Such constitutional concerns applicable to states," the court believed, "do not apply to municipalities." *Id.* But the case on which the court primarily relied for its view that local government entities are entitled to no presumptive constitutional respect, *Monell v. Department of Social Services*, 436 U.S. 658 (1978), does not stand for anything nearly so sweeping. To the contrary, this Court has specifically held that the "distinction" drawn in *Monell* and similar cases "between States and municipalities" is "peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity," and – more to the point for present purposes – does *not* apply "to the question of whether a governmental entity is protected by the Constitution's guarantees of federalism." *Printz v. United States*, 521 U.S. 898, 931 n.15 (1997).[2]

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[2] Ironically, the court of appeals cited *Printz* as an example of the Court's deference to *state* sovereignty, but in fact the federal law at issue in *Printz* acted only upon *county* officials, *see* 521 U.S. at 931 n.15. The

Outside the confines of the Eleventh Amendment, in other words, the general federalism guarantee animating the presumption that operated in *Stevens* ensures respect for the dignity and role of government entities *at all levels*.

Indeed, even on its own terms *Monell* did not rely on a sweeping *general* rule that local government entities are "persons" for purposes of congressional enactments unless Congress clearly says otherwise. To the contrary, the entire discussion in *Monell* cited by the court of appeals here is about the *specific* text and history of § 1983. *See Monell*, 436 U.S. at 685-89. And the court of appeals' citation of that same discussion for the proposition that in *Monell* the Court "noted that, by 1844, both private and municipal corporations were presumptively included within the meaning of 'person,'" *Chandler*, 277 F.3d at 974 (citing 436 U.S. at 685-89), is flatly incorrect. What the *Monell* Court actually says is that by 1844 the rule that natural persons do not include *private corporations* was abandoned, in *Louisville R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844), and that it was not until 1869 – six years *after* the enactment of the False Claims Act – that "the *Letson* principle was automatically and without discussion extended to municipal corporations." *Monell*, 436 U.S. at 688 (citing *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121 (1869)).[3]

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point of the quotation in the text is that outside the context of the Eleventh Amendment, counties and their officers are entitled to the same constitutional respect as are states and their officers.

[3] The *Monell* Court also looked to the Dictionary Act of 1871 for evidence that municipal corporations were subject to liability under 42 U.S.C. § 1983. *See Monell*, 436 U.S. at 688-89 (citing Act of Feb. 25, 1871, § 2, 16 Stat. 431). Because that act was passed eight years after the enactment of the False Claims Act, it also provides no assistance in determining the scope of the word "person" in the earlier legislation.

The court of appeals' rule that local government entities are *always* "persons" *unless* Congress clearly says otherwise – the exact opposite of the presumption applied in *Stevens* – thus finds no support in the cases the court cites. Nor does Congress itself appear to count on the existence of such a presumption in its modern statute-drafting: statute after statute explicitly defines "persons" to include counties, municipalities and other local governmental entities within their purview.[4] If silence in a statutory definition mandated the conclusion that such entities are included because of some presumption to that effect, all of those definitional provisions would be superfluous. They are not, for no such presumption exists, as Congress well knows.

Even if local government entities do not enjoy precisely "the same privilege of place within our constitutional structure enjoyed by the states," *Chandler*, 277 F.3d at 975 n.7, the material point is that local government entities are not burdened with a presumption exactly opposite that of the States, as the court of appeals believed. The question, then, is whether, absent a presumption working against local government entities, the text, history and policies of the False Claims Act support the inference that local government entities are to be considered "persons" even though State government entities are not. But before addressing this question, it is well to note that even with respect to the analysis of States, the Court in *Stevens* did *not* rely solely on a presumption that they are to be excluded. To the contrary, the Court's analysis of the text, history and other policies of the

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[4] *See, e.g.*, 10 U.S.C. § 2507(f)(1); 15 U.S.C. § 77b(a)(2); 15 U.S.C. § 3002(1); 15 U.S.C. § 3301(26); 16 U.S.C. § 4903(4); 30 U.S.C. § 1522(b)(7); 33 U.S.C. § 1362(5); 33 U.S.C. § 1901(a)(8); 33 U.S.C. § 2701(27); 33 U.S.C. § 1362(5); 42 U.S.C. § 2014(s); 42 U.S.C. § 6903(15); 50 U.S.C. § 167(2).

Act stand entirely on their own. As we shall see, they also support the same conclusion with respect to local entities as they do for the States.

2. *The Statute's Text*

Though the statute provides no textual definition of "person," the *Stevens* Court still identified at least several clues in the text of the current statute (beyond a federalism-based interpretive presumption) that States are not to be included within that term. First, the Court compared the empty term "person" in the Act's basic liability provision, 31 U.S.C. § 3729, with the section providing for civil investigative demands, *id.* § 3733, which goes out of its way to define "person" to include "a State," but *only* "[f]or purposes of this section," *id.* § 3733(*l*). "The presence of such a definitional provision in § 3733, together with the absence of such a provision from the definitional provisions contained in § 3729 . . . suggests that States are not 'persons' for purposes of *qui tam* liability under § 3729." *Stevens*, 529 U.S. at 784.[5] That analysis supports the same result here, for § 3733 also defines "person" to include a "political subdivision of a State." The presence of that definitional provision in § 3733, together with its absence from § 3729, thus suggests that counties, too, are not "persons" for purposes of *qui tam* liability under § 3729.[6]

[5] The Seventh Circuit's attempt to distinguish *Stevens* by asserting that the Court's statutory reading there rested on the "presumption that States are not included within the definition of 'person,'" *Chandler*, 277 F.3d at 975 n.7, misreads *Stevens*, which did not rest this point on its earlier discussion of the presumption against State liability but on a reading of the statutory text itself. *See Stevens*, 529 U.S. at 784 (noting that its conclusion that "States [were] not subject to *qui tam* liability" was supported by "[s]everal features of the current statutory scheme").

3. *The Statute's History*

An historical look at the statute's text also provided the *Stevens* Court with an even more specific clue to the meaning of "person." The Court explained:

> As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of "stopping the massive frauds perpetrated by large [private] contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976); see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943). Its liability provision – the precursor to today's § 3729(a) – bore no indication that States were subject to its penalties. Indeed, far from indicating that *States* were covered, it did not even make clear that *private corporations* were, since it applied only to "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States," and imposed criminal penalties that included imprisonment. Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698.

529 U.S. at 781-82 (alterations in original; footnote omitted).

[6] There is no reason to think that the mere provision to the federal government of the power to issue civil investigative demands ("CIDs") to government entities means that Congress necessarily contemplated that such entities could be substantively liable: as the *Stevens* Court noted, CIDs enable the federal government to obtain from government entities "useful evidence in investigations of private contractors." *Stevens*, 529 U.S. at 784 n.13; *see also United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 877 (D.C. Cir. 1999) (same).

All of those observations dictate exclusion of local government entities from the meaning of "person." The statute's focus on the frauds of "private contractors," as the Court described it,[7] would no more encompass the acts of local government entities than it would those of States. The Court's suggestion that the original language – "any person not in the military . . ." – focused on "natural persons" would also tend to exclude local government entities as much as it would States. The same is true for the imposition of "criminal penalties that included imprisonment": it is as metaphysically impossible to cart a county off to the hoosegow as it is to lock up a State.

4. *The Presumption Against Government Liability For Punitive Damages*

A final key point relied upon by the *Stevens* Court was that "the current version of the FCA imposes damages that are essentially punitive in nature" – the Act's treble damages provision – "which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on *governmental entities*." 529 U.S. at 784-85 (emphasis added). On its face that reasoning would extend the presumption to local government entities, and in fact the very case cited by the *Stevens* Court in support of this anti-punitive damages presumption – *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) – applies it to a municipal corporation, to hold that punitive damages are not available under § 1983. As *Stevens* itself describes it, in *City of Newport* the Court was "concerned with imposing punitive

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[7] *See also* John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.019[A], at 1-6 (2001-2 Supp.) ("the vast spending that arose from the Union government's military effort led to widely-publicized abuses by unscrupulous private contractors" (emphasis added)).

damages on taxpayers under any circumstances." 529 U.S. at 785 n.15.

The presumption against punitive damages liability for government entities cited in *Stevens* – which is truly a *general* presumption – rests on the premise that schemes designed to deter, and even to punish, official government wrongdoing, ought not inflict punishment on innocent taxpayers and citizens. Punitive damages "imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *City of Newport*, 453 U.S. at 267. It is one thing for the federal government to reclaim funds improperly obtained or converted by a local government entity, and thereby effectively demand that taxpayers cough up benefits they never should have received; it is another thing altogether to make taxpayers effectively pay additional penalties for acts they never personally committed or ratified:

> [Punitive damages] can never be allowed against the innocent. Those which the plaintiff has recovered in the present case . . ., being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.

City of Newport, 453 U.S. at 261 (quoting *McGary v. President & Council of City of Lafayette*, 12 Rob. 668, 677 (La. 1846)). For that reason, the Court explained in *City of Newport*, the common law had long recognized an immunity

from punitive damages liability for government entities. *Id.* at 260.

This is not to say – and neither *Stevens* nor *City of Newport* says – that the presumption means the federal government is without recourse in deterring and punishing local government wrongdoing. The federal government has other ways of obtaining recovery of monies wrongfully obtained by local governments, *see, e.g., United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 154 F.3d 870, 871 (8th Cir. 1998) (claims for unjust enrichment, payment by mistake, disgorgement of profits, and breach of fiduciary duties); Boese, *supra*, at 1-36 (noting that United States frequently brings common law claims instead of False Act Claims because False Claims Act statute of limitations has expired), and the threat of a large compensatory damages or restitution hit, coupled with interest, is itself an adequate deterrent in many cases. The federal government can always pursue criminal sanctions against individual officials who misappropriate funds. Further, because counties and other local governments are inherently political bodies, "the discharge of offending officials who were appointed and the public excoriation of those who were elected," *Newport*, 453 U.S. at 269, can be expected to exert particularly strong deterrent force. And, in the end, the presumption against government liability for punitive damages is just that: a presumption, one that can be overcome by a sufficiently clear specification of congressional intent to abrogate the traditional government immunity from punitive damages. *See City of Newport*, 453 U.S. at 258.

It is nevertheless a presumption with sharp teeth. The Court simply will not construe a statute silent or ambiguous as to the provision of punitive damages against government entities – *any* government entities – as authorizing such damages. "Unless Congress *clearly* provides otherwise, a local

local governmental entity is immune from punitive damages awards." *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 222 (3d Cir.) (emphasis added), *petition for cert. filed*, 70 U.S.L.W. 3742 (U.S. May 20, 2002) (No. 01-1711). General language alone will not suffice to overcome this presumption – even where the statute in question is one that, like 42 U.SC, § 1983, deliberately targets public entities. *See City of Newport*, 453 U.S. at 258 (noting that the Court "consistently has declined to construe the general language of § 1983 as automatically abolishing such traditional immunities by implication").

The FCA provides for sanctions above and beyond simple restitution, sanctions that are "essentially punitive in nature." *Stevens*, 529 U.S. at 784. These include the *automatic* trebling of damages in *all* cases where the defendant did not actively cooperate in the investigation, as well as civil penalties of up to $10,000 per claim. 31 U.S.C. § 3729(a). As *Stevens* holds, those sanctions implicate the "presumption against imposition of punitive damages on governmental entities." 529 U.S. at 785. And the general language of the FCA providing liability for unspecified "person[s]" obviously cannot overcome the presumption that such punitive damages cannot be applied against a government entity. Nor do the FCA penalty provisions suggest viable distinctions in the nature of the defendants to whom they might be applied. Interpreting the silent word "person" to include local government entities thus would have the effect of imposing on such entities punitive damages liability without any explicit indication that Congress intended for such entities to be within the category of persons who could be liable for such damages. And if the presumption articulated in *City of Newport* and repeated in *Stevens* means anything at all, it is that such an inference cannot be allowed.

The consequences of disregarding the presumption in this

context would be serious. The facts of *United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808 (2002), illustrate the problem. There, a jury found that the Orleans Parish School Board had submitted false unemployment insurance and worker's compensation insurance claims to the federal government. There can be no doubt those findings were serious, and resulted in a serious loss to the federal government – some $7.6 million, by the jury's reckoning. *See Garibaldi*, 244 F.3d at 488. Because of the treble damage provisions of the False Claims Act, however, this judgment ballooned to an award of *$22.8 million*, on top of a separate civil penalty of *$7.85 million*. *See id.* As the Fifth Circuit noted in following this Court's decisions in *Stevens* and *Newport*,

> [P]unishing a local government is pointless. The punishment, in the form of higher taxes or reduced public services, is visited upon the blameless. Neither the taxpayers nor the schoolchildren of Orleans Parish played any role in the conduct giving rise to the School Board's liability. Extracting damages from them – damages that are far more than is needed to compensate the federal government for whatever losses it has suffered – is supported, as the Supreme Court has said, by, "[n]either reason nor justice." [*Newport*, 253 U.S. 267, 101 S. Ct. 2748].

Garibaldi, 244 F.3d at 491-92.

Garibaldi is just one example of the kind of harm that would be caused by the court of appeals' construction of the FCA. The experience of amici confirms the simple intuition that a huge proportion of the federal funds handled by local government entities are funds relating to education programs or welfare/social safety net funds, all of which are typically directed at assisting especially innocent, vulnerable or needy citizens and taxpayers. Even assuming the worst of motives

and conduct by the receiving government entity, it makes little sense to inflict on that entity a crippling financial penalty, which will necessarily be borne by the innocent, vulnerable and needy either in the form of reduced services, or increased taxes to satisfy the exaction. Realistically speaking, however, the motives and conduct of government entities are rarely so starkly invidious. This is especially the case when the entity – like OCHCA – is charged with processing or making claims for payment under federal programs such as Medicare and Medicaid, which have rightly been described as "among the most completely impenetrable texts within human experience." *Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994); *see Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (Medicare laws are "Byzantine"); *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 96 (1995) ("comprehensive and intricate" cost reimbursement regulations consumed some "624 pages of the Code of Federal Regulations" in 1994). It is inevitable that mistakes are made in that process, and it may be unsurprising that such mistakes will sometimes be viewed as willful, but it is wholly unacceptable that extra penalties for such errors should be exacted from the program intended to help those most in need.[8]

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[8] The court of appeals in this case rejected these concerns on the ground that, even though the FCA's penalty provision "shifts" the burden of payment "to the local taxpayers," the shift would not be unjust "because the local taxpayers have already received, without justification, some of the benefit." *Chandler*, 277 F.3d at 978. That argument borders on the frivolous: assuming it is true at all that taxpayers received some of the benefit, the question is *not* whether they should effectively repay the amount they improperly received. It is whether they should be forced to pay penalties *in addition* to that amount, as punishment for the government entity's conduct. This Court's cases have answered that question squarely and consistently no – at least absent the clearest specification by Congress that taxpayers *should* bear such burdens.

Accordingly, for all the foregoing reasons, the bases identified in *Stevens* for excluding States from the ambit of the undefined "persons" covered by the FCA apply equally to local government entities such as petitioner and the undersigned amici.

B. Congress Did Not Likely Intend To Leave Local Government Entities Subject To FCA Liability Based On An Indeterminate "Arm Of The State" Test

The conclusion that local government entities should be treated the same as States for purposes of substantive FCA liability is confirmed by closer scrutiny of a subtle yet significant concession made in the court of appeals opinion. While local government entities are not themselves excluded from the statute, the court reasoned, that result holds only "so long as they are not properly considered arms of the state itself." 277 F.3d at 975 n. 8. Part of that reasoning has to be correct: inasmuch as *Stevens* holds that the States are not subject to suit under the FCA, no political subdivision that is, or is acting as, a part of the State itself, could logically be subjected to suit either. The problem with the reasoning is that it presupposes that Congress would choose to leave the treatment of local government entities' potential liability under the FCA to the "arm of the state" inquiry, which turns out to be a most unlikely presupposition, given the vagaries of that inquiry.

The question whether a local government entity is an arm of the state most often arises in the context of the Eleventh Amendment (or in the closely related context of § 1983 liability). While Eleventh Amendment immunity does not generally "extend to counties and similar municipal corporations," *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), the immunity afforded States also applies to local entities, including counties and other agencies, when they constitute "arm[s] of the State partaking of the State's Eleventh Amendment immunity." *Id.* The inquiry into whether a local entity is acting as the arm of the State can focus on the "essential nature and effect" of the local entity's conduct, *Regents of University of California v. Doe*, 519 U.S. 425, 429 (1997) (internal quotation marks omitted), or on the particular "nature of the entity created by state law," *id.* (internal quotation marks omitted), or both – which means that the same local agency may be an arm of the state depending on which of its functions are at issue. *See, e.g., McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786 (1997) (concluding that county sheriffs in Alabama are state officers *when performing law enforcement functions*); *Richman v. Sheahan*, 270 F.3d 430, 439 (7th Cir. 2001) ("[A] county sheriff may act as an arm of the state when performing *certain* functions.") (emphasis added), *cert. denied*, 122 S. Ct. 1439 (2002). The complication that arises in the Eleventh Amendment context is that the States vary widely among themselves – and even within themselves – in the ways in which they distribute State power, the forms of the entities designated to exercise such power, the extent to which those entities may exercise such power, and so on. *See City of St. Louis v. Prapotnik*, 485 U.S. 112, 124 (1988) ("The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms."). Of particular relevance here, the "importance of counties and the nature of county government have varied historically from region to region, and from state to state." *McMillian*, 520 U.S. at 795.

As applied in the FCA context, the individualized arm of the state approach thus would lead to intensely complicated questions of substantive FCA liability for counties and other local government entities. Because the very same local entity can be an arm of the state for one purpose but not an-

other, litigants and courts will be forced to evaluate the extent to which the local entity was handling federal funds pursuant to the mandate of or at the direction of the State, for example. *See Gottfried v. Medical Planning Servs., Inc.*, 280 F.3d 684, 692 (6th Cir. 2002). The problem is not theoretical. As this Court has noted previously, California counties acting within their general authority may not be arms of the state for some purposes. *See Moor v. County of Alameda*, 411 U.S. 693 (1973) (counties are generally not arms of the state and therefore qualify as citizens for purpose of diversity jurisdiction). But California counties do perform many functions as direct agents for the state. For example, the counties are required to prepare detailed contracts with the state which define the scope and range of mental health services which the county will arrange for or provide. *See* CAL. WELF. & INST. CODE §§ 5650 & 5651. These services include those that the State itself is mandated to provide pursuant to federal law. CAL. WELF. & INST. CODE § 5651(a)(2); CAL. GOV. CODE § 7576. Further, each county also can function as the exclusive managed care organization within its geographic boundaries for purposes of controlling the provision of mental health services to Medicaid beneficiaries. CAL. WELF. & INST. CODE §§ 5775, et seq. These functions are intertwined, since the affected populations overlap. Under the view advanced by the court of appeals, such counties could be held liable under the FCA for claims made in conjunction with one function but not the other if a court was to find that one of these interrelated functions was done as an arm of the state and the other was not. The one thing they will know for sure is that they cannot know for sure to what extent they will be governed by the federal false claims law, which is an outcome no one can applaud.

The fact that such difficulties already arise in the context of establishing basic Eleventh Amendment immunity is no

reason to assume Congress wanted to import those same difficulties into the FCA. The nature of Eleventh Amendment immunity essentially dictates differential treatment between State and local government entities ~~in~~ that particular context. On the one hand, no local entity that is truly distinct from the "State" is entitled to the protection of the Amendment by its terms; on the other hand, every "State" *is* entitled to protection under the Amendment. Thus, if some nominally distinct entity is acting *in fact* as an arm of the State, it cannot be denied immunity because of the inconvenience of the inquiry.

While the inquiry is therefore necessarily individualized under the Eleventh Amendment, it does not have to be so under a statute like the FCA. The question is whether to assume that Congress, by making "persons" liable without defining them, would have intended to create disuniformity and uncertainty with respect to local government FCA liability by tracking the individualized Eleventh Amendment inquiry and protecting local governments only to the extent they are found to be arms of the State. The answer surely is no: having excluded States, the sensible policy result would be to provide the same treatment for *all* government entities at *all* levels.

C. Local Government Entities Are Not "Persons" Under the FCA Regardless Of Who Is Suing Them

It should be clear from all we have said that we believe the issue in this case is one of substantive FCA liability, *viz.*, whether or not local government entities are "persons" under the statute. It remains only to note that the answer to this question cannot turn on the identity or status (private or federal) of the party suing the "person," despite suggestions of a contrary possibility in some opinions. *See Stevens*, 529 U.S. at 789 (Ginsburg, J., concurring); *Dunleavy*, 279 F.3d 219, 221 n.1 (3d Cir. 2002). We submit that the answer is clear

and should be made explicit now, to forestall pointless litigation of the point in the lower courts.

It is difficult to identify even a colorable argument for why an entity that is not a "person" when sued by a private relator is transformed into a "person" when sued by the United States. The only remotely plausible argument appears to be this: to the extent *Stevens* can be said to rest entirely on an interpretive canon that presumptively excludes States but not local government entities from the word "person" *in suits by private parties*, that rationale would not apply to suits by the federal government and thus the exact same word can be read differently. The problems with this view are self-evident. Is the entity a "person" when the suit is first filed on behalf of the United States, but then stops being a "person" if the U.S. declines to intervene? Or is the entity *not* a "person at first, but then becomes one *if* the United States decides to participate? Is the entity in that suit only a "person" when the United States seeks discovery, but not when the relator does? What if the U.S. settles, but the private relator wants to object to the settlement? Is the entity a "person" when negotiating with the U.S. but not when the relator tries to object? Or is the entity *never* a "person" unless the suit is brought by the U.S. only? But isn't the relator suing only as an assignee of the U.S. anyway?

The argument that government entities can be treated differently under the FCA as construed in *Stevens*, depending on who is suing, raises these unanswerable questions because it rests on unsound premises. As we have already demonstrated, *Stevens* did not rely *solely* on a federalism-based presumption – rather, its conclusion was fully supported by independent analyses of the text and history of the statute. And to the extent *Stevens* did rely on such a presumption, it was not limited only to the treatment of States as "persons" in *private* suits. Finally, the more specific presumption cited

by *Stevens* – the rule disfavoring punitive damages against government entities – certainly is not limited to private suits, but evinces a concern about "imposing punitive damages on [innocent] taxpayers under *any circumstances*." *Stevens*, 529 U.S. at 785 n.15 (emphasis added). Forcing the typically needy beneficiaries of government programs to suffer a special penalty for a local government entity's wrongdoing is a senseless policy judgment no matter what party is bringing the suit, which is the heart of the reason why *no* government entity – state or local – is properly included within the meaning of the term "person" in the FCA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. JANET CHANDLER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, MISSISSIPPI SCHOOL BOARDS ASSOCIATION, AND NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000), this Court held that States are not "person[s]" subject to liability under the False Claims Act ("FCA"). The question now before the Court is whether local governmental entities such as municipalities and counties are "person[s]" subject to such liability. This question is vitally important to the Texas Association of School Boards Legal Assistance Fund ("TASB Fund"), the Mississippi School Boards Association ("MSBA"), the National School Boards Association ("NSBA"), and their member school districts and boards.

The TASB is a not-for-profit corporation comprising approximately 1,045 independent Texas school districts through their elected boards of trustees.[2] Under Texas law, a school district board of trustees has "the exclusive power and duty to govern and oversee the management of the public schools of the district." TEX. EDUC. CODE ANN. § 11.151(b) (Vernon 1996). TASB's members are thus responsible for governance of the State's public school districts, consistent

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1. This brief has not been authored as a whole or in part by counsel for a party. No monetary contribution has been made to the preparation or submission of this brief other than by the *amici curiae*, their members, or their counsel. Written consent to this brief has been given by all parties and is on file with the Court.

2. Texas law treats school districts as "quasi-municipal corporations." *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 283 (Tex. 1996); *see also Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987). The filing of this brief should not be construed as an admission that school districts and their boards are not arms of the State for other relevant purposes.

with state and federal law. TASB represents more than 7,000 school board members who preside over annual expenditures of more than $25 billion, employ more than 500,000 people, and serve more than 4 million Texas students.

The TASB Fund advocates on behalf of school districts and administrators in litigation with potential statewide impact. Established in 1980, the TASB Fund includes more than 800 school districts and is governed by officers of the TASB, the Texas Association of School Administrators, and the Texas Council of School Attorneys.

The MSBA represents the interests of public school board members responsible for educating students in kindergarten through twelfth grade in Mississippi. The MSBA's mission is to ensure quality school board performance through advocacy, technical assistance, leadership training, and information dissemination. The MSBA's membership includes representatives from more than 120 public school districts in Mississippi.

The NSBA is a not-for-profit federation of this nation's state school board associations. These boards govern more than 15,000 local school districts that serve more than 46.5 million public school students — over 90 percent of all elementary and secondary public school students in the nation. Founded in 1940, NSBA has had a longstanding interest in educational issues, particularly those affecting funding for educational purposes.

These *amici curiae* are interested in this case because significant federal funds flow to local school districts. A decision on whether local governmental entities such as school districts are subject to punitive damages under the

FCA is likely to have a direct impact on the economic viability of public school systems throughout Texas, Mississippi, and the nation. The discussion that follows uses circumstances in Texas to highlight the significant legal and practical implications of this case for local school districts and students. While the situation in Texas is illustrative, these considerations apply with equal force to school districts nationwide.

Texas school districts received a significant portion of more than $2.5 billion in federal expenditures directed towards public education in Texas in 2000-01. *See* Texas Education Agency, *Snapshot 2001* at 28 (14th ed. 2002) (cited hereafter as "*Snapshot 2001*" and available online at *www.tea.state.tx.us*). Like many other recipients of federal funds, Texas school districts have become the target of *qui tam* litigation under the FCA. *See, e.g., United States ex rel. Gudur v. Tex. Dept. of Health*, 2002 WL 511483 (S.D. Tex. 2002). The prospect that receipt and disbursement of federal funds in aid of education could subject local school districts to unpredictable and potentially enormous punitive damage awards poses a serious threat to individual school districts and to their ability to serve students. This threat has implications in light of longstanding efforts in Texas to address the funding needs of school districts with weak local tax bases, which of necessity must rely more heavily on non-local sources to approach funding levels that wealthier districts can achieve largely through local property tax revenues.

The Fifth Circuit holds that a local school board is not a "person" subject to FCA liability. *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 495 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808 (2002). The holding

in *United States ex rel. Chandler v. Cook County, Ill.*, 277 F.3d 969 (7th Cir.), *cert. granted*, 122 S. Ct. 2657 (2002), rejects *Garibaldi* and creates a circuit split. *Chandler* also threatens to create a perverse circumstance because poorer school districts are more likely to receive federal funds in the course of serving their student populations. Under *Chandler*, the receipt of federal funds would carry with it a greater exposure to imposition of punitive damages on the very school districts that can least afford them. The punishment ultimately is visited upon the students themselves.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's decision in *Chandler* erroneously reverses the presumption against subjecting local governmental entities to liability for punitive damages. *Chandler* allows punitive damages to be assessed in the absence of clear statutory language allowing such damages against local governmental entities, and thereby attributes an intent to Congress that is not manifested by the FCA's express terms. A host of important policy considerations confirm that Congressional intent to allow punitive damages against local governmental entities should not be lightly inferred.

These policy considerations become especially compelling when the circumstances of local school districts are considered. Authorizing treble damage awards against school districts under the FCA unconscionably punishes children for the acts of adults. Money spent to pay treble damages cannot be spent educating students.

Subjecting school districts to treble damages unjustly punishes blameless taxpayers. The punishment is inflicted not just upon those who reside in the defendant school district, but also upon taxpayers far removed from a particular district who may be called upon to contribute by means of statewide funding mechanisms.

Additionally, incongruous results may occur in situations where federal funds are jointly administered by the State and local school districts. Under this Court's decision in *Stevens*, as interpreted in *Chandler*, a local school district would be the only party subject to liability for punitive damages under the FCA even if both entities engaged in precisely the same conduct with respect to jointly administered federal funds.

In light of the strong presumption against allowing awards of punitive damages against local governmental entities, along with the compelling policy considerations underlying that presumption, this Court should reject the Seventh Circuit's effort to expand the FCA's scope beyond its plain statutory terms.

ARGUMENT

The case involves two key questions. The first is this: What did Congress say in the FCA's express terms? The second is this: Do the statute's express terms overcome the longstanding presumption against allowing punitive damage awards against municipalities and other local governmental entities?

I.

LOCAL GOVERNMENTS ARE NOT "PERSON[S]" UNDER THE FCA

The TASB Fund, MSBA, and NSBA agree with Petitioner's threshold contention that local governments are not "person[s]" within the meaning of the FCA. Petitioner's "plain language" analysis demonstrates that Congress' use of the undefined term "person" in the FCA — unchanged since the statute's enactment in 1863 — does not encompass local governments in light of the statute's context. Contrary to the Seventh Circuit's analysis, the FCA's plain language and context cannot properly be expanded by relying upon "evidence" such as post-enactment legislative history. *See Chandler*, 277 F.3d at 975 ("the legislative history of the 1986 amendments . . . makes it likely that the Congress, when voting on the amendments, was aware that the FCA might reach municipalities"); *but see Garibaldi*, 244 F.3d at 489 n.3 ("post-enactment legislative history [is] . . . 'utterly irrelevant' to determining the meaning of the term person in the liability portions of the False Claims Act") (quoting *Stevens*, 529 U.S. at 783 n.12).

The discussion below focuses on the related question of whether the FCA's text clearly sets forth a Congressional intent to abrogate local governments' presumptive immunity from punitive damages. *See United States ex rel. Dunleavy v. County of Del.*, 279 F.3d 219, 223 (3d Cir. 2002) ("whether the term 'person' as used in the [FCA] encompasses local governments . . . is simply the other side of the coin with respect to the question . . . whether Congress clearly abrogated local governmental immunity under the FCA"). The Seventh Circuit erred by reversing the presumption in

Chandler and reading an abrogation of immunity into the FCA's text when no such abrogation is specifically stated. The circumstances of school districts and the ramifications of such a decision vividly illustrate why the sound policy considerations underlying this presumption should not be so casually disregarded.

II.

LOCAL GOVERNMENTS ARE PRESUMED TO BE IMMUNE FROM PUNITIVE DAMAGES

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court assessed Congressional intent under 42 U.S.C. § 1983 in light of the longstanding presumption against awarding punitive damages against a municipality. *Id.* at 271. The Court noted that by the time Congress enacted what is now Section 1983, "the immunity of a municipal corporation from punitive damages at common law was not open to serious question" and that "the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation." *Id.* at 259-60 (citations omitted). This tradition of immunity remains a fixture of modern jurisprudence. *Id.* at 260-61 & n.21 ("Judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions," and "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute") (citations omitted).

To overcome the presumption against awarding punitive damages against municipalities, a claimant must establish that Congress ***specifically intended*** to abolish the presumption

in enacting the statute in question. *Id.* at 263 ("Congress would have specifically so provided had it wished to abolish the doctrine") (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). Absent a specific indication of Congressional intent to abrogate immunity from punitive damages, the claimant must address "whether considerations of public policy dictate a contrary result." *Id.* at 266.

This Court has identified several compelling policy considerations that inform an analysis of whether Congress intended to impose punitive damages on the innocent citizens and taxpayers who reside in a municipality:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Id. at 267; *see also id.* at 263 ("In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. . . . The courts thus protected the public from unjust punishment, and the municipalities from undue fiscal constraints"); *id.* at 261 ("Those [damages] which the plaintiff has recovered in the present case . . . , being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by

widows, orphans, aged men and women, and strangers") (quoting *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 677 (La. 1846)).

Assuming that Congress adopted the FCA's treble damages scheme in part to deter future wrongdoing, this Court has rejected such a rationale as a basis for overcoming the presumption of immunity. First, this Court noted that "it is far from clear that municipal officials . . . would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality" because

> [i]ndemnification may not be available to the municipality under local law, and even if it were, officials likely will not be able themselves to pay such sizable awards. Thus, assuming, *arguendo*, that the responsible official is not impervious to shame and humiliation, the impact on the individual tortfeasor of this deterrence in the air is at best uncertain.

Id. at 268-69.

Second, this Court has rejected the notion that punitive damages are necessary to spur corrective action against the offending official since "[t]he more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Id.* at 269 (quoting *Carlson v. Green*, 446 U.S. 14, 21 (1980)). Furthermore, "if additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office." *Id.*

Third, the Court noted that, as a practical matter, a punitive damages award against an individual official would be a more effective means of deterring future misconduct than a punitive damages award against a municipality, particularly since the burden of such an award "would most likely fall upon the citizen-taxpayer" rather than the individual official. *Id.* at 269-70.

Finally, the Court concluded that the potentially sizable and unpredictable nature of punitive damages awards strongly argues against abolishing the presumption of immunity. *Id.* at 270-71. Absent a "compelling" reason for awarding punitive damages, any possible benefit of such an award does not outweigh the "possible strain" that the award may inflict "on local treasuries and therefore on services available to the public at large." *Id.* at 271.

These policy considerations form the backdrop against which *Chandler*'s analysis of Congressional intent must be examined.

III.

CHANDLER'S ANALYSIS IMPROPERLY REVERSES THE PRESUMPTION AGAINST IMPOSING PUNITIVE DAMAGES ON LOCAL GOVERNMENTS

The starting point is simple enough: As this Court stated in *Stevens*, "the current version of the FCA imposes damages that are ***essentially punitive*** in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 784 (emphasis added). These words apply with equal force to school districts.

The Seventh Circuit's decision in *Chandler* ignores — indeed, it reverses — this historical presumption against awarding punitive damages against local governments. The Seventh Circuit improperly held that local governments are liable for punitive damages under the FCA because there is no evidence Congress intended to exempt them from such liability in enacting the FCA. *Chandler*, 277 F.3d at 979 ("In enacting the 1986 changes to the [FCA] . . . Congress did not indicate in any way that it intended to exempt municipal entities from the scope of the statute"); *see also id.* ("[D]espite the presumption against the imposition of punitive damages on municipalities, it is clear that Congress, in enacting the 1986 changes to the FCA, made a conscious choice to increase the recoverable damages while in no way indicating that it wished to exempt municipalities").

The Seventh Circuit's analysis turns the presumption of immunity on its head by requiring local governments to establish that Congress intended to ***exempt*** them from liability for punitive damages, rather than requiring claimants to establish that Congress expressly stated an intent to ***include*** local governments among the "person[s]" subject to punitive damages under the FCA.

In essence, the Seventh Circuit concludes that "Congress spoke by not speaking." *See Boureslan v. Aramco*, 857 F.2d 1014, 1020 (5th Cir. 1988), *aff'd*, 892 F.2d 1271 (5th Cir. 1990) (en banc), *aff'd sub nom. E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). This conclusion is erroneous because, as the Fifth Circuit observed in an analogous context involving the presumption against extraterritorial application of United States statutes, "silence will not reverse the presumption." *Boureslan*, 857 F.2d at 1020.

By abrogating immunity from punitive damages in the absence of a specific expression of Congressional intent to do so, the Seventh Circuit opens the door to the imposition of FCA treble damages on innocent taxpayers. The circumstances of Texas school districts highlight the pernicious effects that will flow from this unwarranted expansion of FCA liability.

IV.

ALLOWING PUNITIVE DAMAGES AGAINST SCHOOL DISTRICTS ULTIMATELY VISITS THE PENALTY UPON BLAMELESS STUDENTS AND TAXPAYERS

Compelling public policy considerations support proper application of the presumption here. Money used to satisfy a punitive damages judgment against a school district cannot be used to educate students. The punishment likely will be visited not only upon an individual school district, but also upon taxpayers outside the school district who cannot plausibly be said to have enjoyed some illicit "benefit" from the targeted conduct.

As the Fifth Circuit recognized in *Garibaldi*, "punishing a local government is pointless." 244 F.3d at 491. "The punishment, in the form of higher taxes or reduced public services, is visited upon the blameless." *Id.* "Neither the taxpayers nor the schoolchildren of Orleans Parish played any role in the conduct giving rise to the School Board's liability." *Id.* "Extracting damages from them — damages that are far more than is needed to compensate the federal government for whatever losses it has suffered — is

supported . . . by . . . '[n]either reason nor justice.' " *Id.* at 491-92 (quoting *City of Newport*, 453 U.S. at 267).[3]

The Seventh Circuit responds to this argument by positing that "the taxpayers themselves have been enriched by the fraudulent conduct of" the local governmental entity. *Chandler*, 277 F.3d at 978. "Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit." *Id.*

The Seventh Circuit's reasoning cannot withstand scrutiny. It is tenuous at best to require "repayment" of indirect "benefits" received in some highly abstract sense by the taxpayers at large. It is more tenuous yet to require threefold "repayment" of these indirect and abstract "benefits."

The Seventh Circuit's reasoning becomes even more strained when the interests of students are factored into the equation. Common sense defeats any suggestion that it is "not unjust" to punish schoolchildren for conduct undertaken by others — conduct the students themselves could have had no conceivable role in committing. This argument is especially untenable under *City of Newport,* in which the Court recognized the inequity of forcing innocent taxpayers "who took no part in the commission of the tort" to shoulder

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3. A number of courts have declined to subject school districts to liability for punitive damages in other contexts. *See, e.g., Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 76 (D.N.H. 1997) (presumption bars recovery of punitive damages against school districts under Title IX); *Scott v. Abilene Indep. Sch. Dist.*, 438 F. Supp. 594, 599 (N.D. Tex. 1977) (presumption bars recovery of punitive damages against school districts under Section 1983).

the burden of punitive damages. *See* discussion *supra*, pp. 8-9. No rational public policy interest is served by forcing schoolchildren to pay for an adult's acts through a reduction in services that would accompany a school district's payment of treble damages. In keeping with *City of Newport*, this Court should decline to consider the asserted benefits a local governmental entity's constituents may receive in determining whether punitive damages properly have been expressly authorized against a local governmental entity. *Id.*

Additional circumstances involving Texas school districts confirm that *Chandler* erred by attributing to Congress an unspoken intent to subject local governments to punitive damages under the FCA.

The Seventh Circuit assumes that a primary consideration is the propriety of shifting treble damages to "local taxpayers [who] have already received, without justification, some of the benefit" from submission of false claims for payment. *See Chandler*, 277 F.3d at 978. This perspective is too narrow because, as school funding in Texas illustrates, "local taxpayers" are not the only ones to whom such damages are shifted.

Texas school districts obtain revenues from an amalgam of sources, including local property taxes, state appropriations, and federal funding. *See Snapshot 2001* at 23.[4] School

4. Due to disparities in the abilities of different school districts to raise revenue through local property taxes, the Texas Legislature adopted a finance system for supplementing local revenues. *Snapshot 2001* at 23. After a decade-long legal battle in which the Legislature's school funding mechanisms repeatedly were invalidated under the Texas Constitution, the Legislature enacted a system in 1993 that survived review. *Id.*; *see Edgewood Indep. Sch. Dist. v. Meno*, 917 (Cont'd)

districts with weak local tax bases receive a greater proportion of their revenues from non-local sources; in contrast, wealthier districts fund their operations with a greater percentage of local property taxes. *Id.* at 24-26. It follows that obtaining money to pay an adverse judgment against a school district is not necessarily a matter of using funds collected from "local taxpayers." *See San Antonio Indep. School Dist.*, 936 S.W.2d at 284 ("a judgment against a school district may be paid with funds initially appropriated to the school district by the State. . . . A judgment against a school district must be paid from the funds of the school district, whether generated locally or appropriated by the State"). Rather, taxpayers statewide may, in effect, shoulder part of the treble damages burden imposed on a particular school district. Even if one grants the benefit of some considerable doubt to the Seventh Circuit's justification for penalizing "local taxpayers," that justification surely does not stretch far enough to cover taxpayers across the State who may subsidize an individual school district's punitive damages award.

Consider too the circumstance that federal money may be administered jointly by the State and a local school district. *See Snapshot 2001* at 27 ("Often, federal appropriations permit both local and state use of each state's allocation. The portion of the state's allocation to be spent by local school districts is distributed by formula"). Under *Chandler*, a school

(Cont'd)

S.W.2d 717 (Tex. 1995). This system features a mechanism under which school districts exceeding a certain "wealth level" must choose among various options for equalizing wealth levels, including the option to contract to educate students in other districts. *See Snapshot 2001* at 25-26. Of the 83 districts exceeding the equalized wealth level in 2000-2001, 43 chose this option or this option combined with another. *Id.* at 26.

district could be subject to treble damages while its partner the State would not be subject to FCA liability — even if both entities engage in precisely the same conduct with respect to jointly administered federal funds.

Finally, the complex web of federal statutes and regulations governing local education also should be considered. Many school districts receive federal funds for use in connection with federal education programs. If school districts are subject to liability under the FCA, they will be faced with a Hobson's choice between (1) accepting federal funds and subjecting themselves to potentially ruinous liability for violations of the requirements for obtaining and spending such funds; or (2) foregoing federal funds and depriving students of the opportunities and benefits such funds provide.

A recent example of federal funding for local education is the No Child Left Behind Act of 2001 ("NCLBA"), which authorizes the distribution of billions of dollars in grants each year to State and local educational agencies.[5] These grants fund a range of worthy initiatives, including programs to improve academic achievement, reading programs for children, prevention and intervention programs for neglected, delinquent, or at-risk children, school dropout prevention initiatives, teacher training and recruiting programs, and education technology programs. *See* 20 U.S.C. §§ 6301, *et seq*.

The statutory provisions governing applications for and disbursements of federal funds under the NCLBA are voluminous and complicated; the accompanying regulations being developed to implement the NCLBA promise to add new

5. An overview of the NCLBA's goals and requirements is available online from the Department of Education at *www.edu.gov*.

layers of complexity. *Qui tam* litigation thrives in an oxygen-rich environment of federal money, statutory complexity, and regulatory ambiguity. Local school districts and administrators attempting to navigate these complexities may have to consider foregoing such funds, and the opportunities and benefits they can provide, rather than face the risk of treble damages based on a misstep in the process of applying for and disbursing federal dollars. Subjecting school districts to liability under the FCA thus undercuts the NCLBA's goal of improving education and creates a disincentive for school districts to participate in federally funded programs.

These risks are underscored by the development of a jurisprudentially suspect "implied certification" theory of FCA liability, under which statutory penalties are predicated upon a claimant's purported "implied but false" certification that it has complied with all regulatory requirements affecting the federal government's payment decision.[6] While the viability of such a theory is subject to serious doubt, its emergence nonetheless promises to fuel new litigation efforts as relators and the *qui tam* bar seek to broaden the FCA's scope.

Under these circumstances, lightly attributing to Congress an intent to subject local governmental entities to punitive damages is inappropriate and unwarranted. These circumstances emphasize the importance of insisting upon the requisite clear statement of Congressional intent to abrogate immunity from punitive damages. The FCA's plain terms do not meet this high threshold.

6. *See, e.g., United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *Mikes v. Strauss*, 274 F.3d 687, 699-700 (2d Cir. 2001); *Shaw v. AAA Eng'g and Drafting*, 213 F.3d 519, 531-33 (10th Cir. 2000); *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and judgment should be rendered in favor of Cook County, Illinois.

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No. 01-1572

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COOK COUNTY, ILLINOIS,
Petitioner,

-v.-

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

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BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK, THE CITY OF BOSTON, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF CHICAGO, THE CITY OF INDIANAPOLIS, AND THE CITY OF MILWAUKEE IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

The City of New York, the City of Boston, the City and County of San Francisco, the City of Chicago, the City of Indianapolis and the City of Milwaukee, respectfully submit this brief as *amici curiae* in support of reversal of the judgment of the United States Court of Appeals for the Seventh Circuit in *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002), *cert. granted sub nom. Cook County v. United States ex rel. Chandler*, 122 S.Ct. 2657 (2002).[1] The Seventh Circuit's determination in

[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no

this case that local governments are amenable to suit under the federal False Claims Act ("FCA") involves a vitally important issue for local governments around the country facing potentially overwhelming liability exposure under the Seventh Circuit's decision. Allowing this decision to stand will subject local governments to the FCA's massive punitive remedies of treble damages plus penalties and will undermine this Court's long-standing presumption that local governments are immune from punitive remedies in the absence of explicit statutory authorization.

The City of New York is a political subdivision of the State of New York that annually receives billions of dollars in federal funds either directly from the United States or through the State for numerous essential municipal services and programs. In some instances, the City of New York is responsible for providing these essential services to its citizens and for implementing these programs, and in other instances, the City is responsible for determining eligibility for these programs. Generally, the federal government and the State of New York disburse the funds and monitor their expenditure.

The City of Boston is a political subdivision of the Commonwealth of Massachusetts. The City and County of San Francisco is a political subdivision of the State of California. The City of Boston and the City and County of San Francisco annually receive significant sums of federal funds either directly from the United States or through the State for essential municipal services and programs.

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person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. The filing of this *amici* brief is accompanied by the written consent of all parties.

Subjecting the City of Boston and the City and County of San Francisco to treble damage liability under the FCA would harm local taxpayers who would be called upon to pay those damages, and would also harm the beneficiaries of essential local services, who would face the reduction or elimination of those services to pay those damages.

The City of Chicago is the largest municipality in the Seventh Circuit, which rendered the erroneous decision below. The City of Indianapolis is the largest city in Indiana and is located within the Seventh Circuit. The City of Chicago and the City of Indianapolis are very concerned that if the Seventh Circuit's decision is not reversed, they will be subject to treble damages and attorney's fees under the FCA.

The City of Milwaukee is a political subdivision of the State of Wisconsin. In fiscal 2001, the City of Milwaukee received approximately $50.6 million in federal dollars to either spend or administer primarily for Community Development Block Grants and for public health and law enforcement purposes.

Amici are deeply interested in the outcome of this case. *Amici* submit that, in seeking to combat private military profiteering during the Civil War by enacting the FCA, and in subsequently amending the statute to augment punitive remedies, Congress never intended to burden local taxpayers with treble damages, penalties and a windfall to an individual whistleblower. *Amici* urge the Court to reverse the Seventh Circuit's determination that local governments are "persons" subject to suit under the FCA.

SUMMARY OF ARGUMENT

This case involves battling presumptions governing the interpretation of the word "person" in a *qui tam* suit under the FCA. In concluding that a State is not a "person" under the FCA, this Court held that the treble damages and civil penalties imposed under the FCA were "punitive in nature." *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 784-85, 120 S.Ct. 1858, 1869 (2000). Accordingly, the long-standing "presumption against imposition of punitive damages on governmental entities" counseled against imposing State *qui tam* liability under the FCA. *Id.,* citing *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748 (1981). The rationale for this common law protection is that punitive sanctions against governmental entities punish innocent taxpayers, not actual wrongdoers, and subject those entities to undue fiscal constraints. *City of Newport,* 453 U.S. at 259-64, 101 S.Ct. at 2756-58. In *City of Newport,* this Court stated the general rule that, in light of the presumption of municipal immunity, "Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 263, 101 S.Ct. at 2758, citing *Pierson v. Ray,* 386 U.S. 547, 555, 87 S.Ct. 1213, 1218 (1967).

Application of the presumption against the imposition of punitive remedies on governmental entities should lead to a similar conclusion in this case: local governments are not "persons" under the FCA.[2] However,

[2] *Amici* address only whether a local governmental entity is a proper *qui tam* defendant, not whether it is a proper *qui tam* relator. *See Stevens,* 529 U.S. at 787 n.18, 120 S. Ct. at 1871 n.18 (leaving open question of whether States can be "persons" for purposes of commencing FCA *qui tam* action after finding that States were not "persons" for purposes of *qui tam* liability).

in holding Cook County amenable to suit under the FCA, the Seventh Circuit rejected this interpretive rule, holding just the opposite: that Congress must specifically indicate its intent to exempt local governments from the FCA's statutory scheme imposing punitive remedies. *United States ex rel. Chandler v. Cook County,* 277 F.3d 969, 979 (7th Cir. 2002). The Seventh Circuit reached this result by presuming that local governments were included within the meaning of the word "person" in 1863. *Id.* at 974. The court below sought to rely for this presumption on *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018 (1978), where this Court found that it was clear by 1871 that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687, 98 S.Ct. at 2034. The court below implicitly reasoned that local governments were corporations, and therefore presumed them to be "persons" in accordance with the Circuit Court's reading of *Monell*.

The Seventh Circuit's assumption that in 1863, the word "person" in the FCA included local governments because "corporations" presumptively included local governments, is, however, erroneous. The evolving state of the law regarding the corporate status of local governments in 1863 indicates that Congress would not have presumed that "corporations" included local governments. Moreover, the historical context in which the FCA was enacted demonstrates that Congress was concerned with fraud by private contractors, not local governments. Thus, consistent with *Stevens*, the presumption against the imposition of punitive remedies on governmental entities, combined with the fact that Congress did not envision local governments as "persons" in 1863, dictate that local governments should not be subject to suit under the FCA.

ARGUMENT

I

THE FCA'S PUNITIVE REMEDIES ARE INCONSISTENT WITH THE PRESUMPTION AGAINST IMPOSING PUNITIVE DAMAGES ON GOVERNMENTAL ENTITIES.

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748 (1981), this Court held that municipalities were immune from punitive damages under the Civil Rights Act of 1871, 42 U.S.C. §1983. In so holding, the Court reviewed the long history of municipal immunity, and reiterated that "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Id.* at 260 n.21, 101 S.Ct. at 2756 n.21. The rationale for this common law immunity from punitive remedies is simple: punishment should be imposed only against actual wrongdoers and not against the taxpaying citizens of the community. *Id.* at 261-63, 101 S.Ct. at 2756-58. The presumption against punitive remedies protects "the public from unjust punishment, and the municipalities from undue fiscal constraints." *Id.* at 263, 101 S.Ct. at 2757-58. The Court recognized the serious fiscal consequences of imposing punitive remedies on local governments, stating that the "windfall" to the plaintiff is "likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* at 267, 101 S.Ct. at 2760.

In *Stevens*, this Court reiterated the presumption against the imposition of punitive remedies on governmental entities in holding that States are not "persons" subject to suit under the FCA. *Stevens*, 529 U.S. at 784-85, 120 S.Ct. at 1869-70. The Court specifically rejected the argument that *City of Newport* was inapplicable in the context of the FCA, reading *City of Newport* to mean that the Court was "concerned with imposing punitive damages on taxpayers under any circumstances." *Id.* at 785 n.15, 120 S.Ct. at 1869 n.15. Further, this Court explicitly found that the FCA remedy of treble damages plus civil penalties is, in fact, "punitive in nature." *Id.* at 784, 120 S.Ct. at 1869.

The presumption of governmental immunity from such punitive remedies as appear in the FCA is rebutted only if Congress explicitly so provides. Because there is no such explicit congressional instruction here, the presumption of governmental immunity mandates a finding that local governments are not "persons" under the FCA.

II

THE TERM "PERSON" WAS NOT PRESUMED TO INCLUDE LOCAL GOVERNMENTS IN 1863.

This Court in *Stevens* held that, because the term "person" in the FCA "has remained in the statute unchanged since 1863," it is the intent of the 1863 Congress that should be analyzed, not the 1986 amendments to the statute. *Stevens*, 529 U.S. at 783 n.12, 120 S.Ct. at 1868 n.12. The Court in *Stevens* also noted that corporations are presumptively covered by the term "person." *Id.* at 782, 120 S.Ct. at 1868. Hence, the

pertinent question here is whether, in 1863, it was so clear that the term "corporation" included local governments that Congress would have presumed "person" as used in the FCA to have included local governments.

An analysis of treatises on local government establishes that local governments would not likely have been presumptive "corporations" in 1863. While "municipal corporations" -- "duly incorporated not primarily to enforce state laws, but chiefly to regulate the local affairs of the city, town or district incorporated by proper legislation and administration" -- did exist, many local governments were not "municipal corporations" in 1863. Roger W. Cooley, *Handbook of the Law of Municipal Corporations* 15 (1914). A local government might also take the form of a "quasi-corporation," which was not in fact a "corporation," but "an almost corporation." *Id.* at 12-13. Depending on state law, quasi-corporations included counties, townships, school districts, road districts, public commissioners, boards of supervisors, school trustees and the like. *Id.* at 494-95. Quasi-corporations were not only not real corporations, they were exempt from the "general law of corporations." *Id.* at 496 ("Subject to statutory regulation, there are, of course, certain peculiar qualities and attributes common to all quasi corporations, which distinguish them from municipalities, and exempt them from the general law of corporations.").

There were significant differences between "municipal corporations" and "quasi-corporations." "Municipal corporations" were given corporate capacity at the request of or with the consent of the inhabitants, while "quasi-corporations" were mere subdivisions of the State. 1 John F. Dillon, *A Treatise on the Law of Municipal Corporations* §10 p. 30-33 (1872). Depending on state

law, "municipal corporations" would be liable for their torts, but "quasi-corporations" would not be liable unless made so by express legislative enactment. *Id.* at 33. A local government that was a "municipal corporation" in one State may have been a "quasi-corporation" in another State.

State law governing the corporate nature of local governments developed differently in different States in the first half of the nineteenth century. In New York, for example, which followed English law, only a chartered borough could be a corporation -- so towns were not corporations. Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U.L. Rev. 369, 372, 392-93 (1985). Even towns and villages which were incorporated by statute were distinguished from chartered boroughs, which were the "real" corporations. *Id.* at 400, 392-410. Towns and villages might be "quasi corporations" or they might be "corporations for a particular purpose," but they were not "real" corporations. *Id.* at 403-10. By contrast, in Massachusetts, courts early on held that New England towns were a new type of "municipal" corporation. *Id.* at 410-14.

In 1863, there simply was no uniform national consensus on the legal status of local governments as "corporations," as reflected by the variability of state laws and the differing assumptions concerning local governments, cities, towns, counties and other public entities. The absence of a uniform understanding of the status of local governments in 1863 makes it highly unlikely that Congress simply presumed that the term "corporation" would include local governments.

As support for its position that local governments were presumed to be corporations and hence "persons" under the FCA, the Seventh Circuit relied on this Court's statement in *Monell* that "by 1871, it was well understood that corporations should be treated as natural persons . . . ." 436 U.S. at 687, 98 S.Ct. at 2034. However, the Seventh Circuit failed to note the Court's distinction between private corporations and municipal corporations. *Id.* at 688, 98 S.Ct. at 2034. While it is true that the "*Deveaux* doctrine," denying that private corporations were "citizens" as that term was used in Article III and the Judiciary Act of 1789, had been abandoned by 1844, *id.* at 687-88, 98 S.Ct. at 2034, citing *Louisville R. Co. v. Letson*, 2 How. 495, 558 (1844) and *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809), no such understanding had been reached with respect to municipal corporations. Indeed, this Court in *Monell* was quite clear that the principle of treating corporations as persons was not "automatically without discussion extended to municipal corporations" until 1869, six years *after* the FCA was enacted. *Monell*, 436 U.S. at 688, 98 S.Ct. at 2034, citing *Cowles v. Mercer County*, 7 Wall. 118, 121, 74 U.S. 118 (1869). This period of uncertainty concerning the status of corporations was noted in the debates over the Civil Rights Act of 1871. *See* Cong. Globe, 42d Cong., 1st Sess. 752 (1871) (Rep. Shellabarger) ("[Counties], cities, and corporations of all sorts, *after years of judicial conflict*, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States")(emphasis supplied), cited in *Monell*, 436 U.S. at 688 n.50, 98 S.Ct. at 2034 n.50.

Further, even this Court's 1844 decision that private corporations were "citizens" of a State within the meaning of the jurisdictional provisions of Art. III did not mean that corporations were to be treated as "persons" for all purposes or were presumptive "persons" for purposes of statutory construction. For example, in 1869, the Court held that private corporations were not "citizens" within the meaning of the Privileges and Immunities Clause, U.S. Const. art. IV, § 2. *Paul v. Virginia*, 8 Wall. 168, 75 U.S. 168 (1869). Congress itself did not create a statutory presumption that the word "person" included "bodies politic and corporate" until the 1871 Dictionary Act, which so presumed "unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, §2, 16 Stat. 431. Because the FCA was enacted in 1863, eight years prior to the 1871 Dictionary Act, the statutorily-created presumption could not have applied to the FCA. *See Quern v. Jordan*, 440 U.S. 332, 341 n.11, 99 S.Ct. 1139, 1145 n.11 (1979) (Dictionary Act presumption inapplicable to 1871 Civil Rights Act when it came more than five years after passage of the Civil Rights Act of 1866, which served as the model). Even this congressional presumption was short-lived, as the Dictionary Act was amended in 1874 to eliminate the definition. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 81, 109 S.Ct. 2304, 2318 (1989)(Brennan, J. dissenting)(citing T. Durant, Report to Joint Comm. on Revision of Laws 2 (1873)).

Nor is the enforcement by the federal courts of the Contract Clause against municipal corporations in municipal bond cases as early as 1861 a sufficient basis from which to conclude that Congress would have presumed the term "person" in the FCA to include local governments. *See, e.g., Board of Commissioners v.*

Aspinwall, 24 How. 376, 65 U.S. 376 (1861), cited in *Monell*, 436 U.S. at 673 n.28, 98 S.Ct. at 2027 n.28. First, even in *Monell*, this Court did not date the presumption that municipal corporations were persons for Art. III purposes from the *Aspinwall* decision, but rather from the 1869 decision of *Cowles v. Mercer County*, 7 Wall. 118, 74 U.S. 118 (1869). *See Monell*, 436 U.S. at 688, 98 S.Ct. at 2034. The Supreme Court in *Cowles* recognized that the question "whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois" was the only question presented by the case "which has not been heretofore fully considered and repeatedly adjudicated." *Cowles*, 74 U.S. at 121. Thus, despite the *Aspinwall* line of cases, the Supreme Court in 1869 believed that the Art. III question was not then fully settled.

Second, in cases such as *Aspinwall*, the Supreme Court declared a "special rule" involving a municipal corporation's obligation to honor bonds issued in support of railroads, a rule which was subject to resistance in the States and the state courts for many years. *See* VI Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-1888*, ch. XVII, at 947, and 918-1009 (1971). The wide-ranging defiance in the States, *id.*, makes it unlikely that Congress in 1863 used these particular cases to presume anything about the corporate status of local governments.

The Seventh Circuit was accordingly mistaken in reading *Monell* as supporting a presumption that local governments were considered "corporations" or "persons" at the time of the enactment of the FCA in 1863. Given the evolving state of the law at the time regarding local governments, there simply was no such presumption.

III

THE HISTORICAL CONTEXT OF THE FCA INDICATES THAT CONGRESS DID NOT INTEND THE TERM "PERSON" TO INCLUDE LOCAL GOVERNMENTS.

This Court has already observed that, "As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Stevens*, 529 U.S. at 781, 120 S.Ct. at 1867, quoting *United States v. Bornstein*, 423 U.S. 303, 309, 96 S.Ct. 523, 528 (1976). In 1863, the Congress of the United States was receiving "alarming reports from the battlefield. These reports concerned Union soldiers opening crates of muskets only to find them filled with sawdust instead of arms. Reports of the same horses and mules being sold to the United States cavalry three and four times further demonstrated a serious problem with war profiteers." James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 Ohio N.U. L. Rev. 35 (1991) (citations omitted). Abuses were being committed by contractors, suppliers, railroads, sutlers and even military officers in connection with the war effort. *See generally* H.R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii-a (1862) ("1862 House Rep."); H.R. Rep. No. 49, 37th Cong., 3d Sess. (Mar. 3, 1863) ("1863 House Rep."); Cong. Globe, 37th Cong. 3d Sess. 952-58 (1863).

The legislative history gives no hint of abuses by state or local governments. The 1862 House Report, which was not prepared in connection with the 1863 FCA or in connection with any proposed false claims legislation, mentioned States only twice: once, as victims of fraud in their role as purchasers of military supplies, 1862 House Rep. at XXXVIII; *see Stevens*, 529 U.S. at 783 n.12, 120 S. Ct. at 1868 n.12; and a second time, as market competitors with the federal government for military supplies from foreign suppliers. 1862 House Rep. at LXXVIII. Local governments are not mentioned at all in any of the legislative materials, either in connection with "abuses" or with government contracts.

Nor is it likely that members of Congress in 1863 would presume that a statute addressing "any claim upon or against the Government of the United States" for "payment or approval" would apply to local governments. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. First, by contrast to the shoemakers, tent pole makers, blanket, and horse and mule suppliers described by Congress as involved in war profiteering, there is nothing in the historical record to indicate that local governments served as suppliers or contractors to the Government of the United States during the Civil War. *See* 1862 House Rep. *passim*. Since there was no custom or practice of federal-local contracting, it is unlikely that Congress would have envisioned a local government submitting a "claim for payment or approval" to the Government of the United States.

Second, federal fiscal contributions even to the States were extremely limited in the mid-nineteenth century, and primarily took the form of land grants, which were regarded as "'gifts' of the federal government and subject to no legally binding constraints." George F.

Break, *Fiscal Federalism in the United States: The First 200 Years, Evolution and Outlook*, *in* Advisory Commission on Intergovernmental Relations, The Future of Federalism in the 1980s, at 41 (July 1981) ("*Fiscal Federalism*"). *See also* Arnold M. Howitt, *Managing Federalism: Studies in Intergovernmental Relations* 4 (1984) ("*Managing Federalism*"). It was only in the Morrill Act of 1862, supporting education in the agricultural and mechanical arts, that Congress established the first land grant program to the States that had any accountability requirements. Act of July 2, 1862, ch. 130, 12 Stat. 503. Not until 1887, in the Hatch Act, did Congress provide for annual cash grants to the States, in support of agricultural experiment stations, and attach compliance requirements. Act of Mar. 2, 1887, 24 Stat. 440; *Fiscal Federalism* at 43; *Managing Federalism* at 4. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544, 63 S. Ct. 379, 384 (1943)(at the time of the passage of the FCA, federal aid to States consisted primarily of land grants).

In 1863, Congress was just beginning to envision the possibility of attaching conditions to state land grants. As for local governments, there do not appear to have been any conditional grants, or grants of any kind. Thus, there was little chance that Congress had local governments in mind when discussing "claims for payment or approval" submitted to the federal government.

CONCLUSION

For all of the above reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

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No. 01-1572

In the Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *EX REL.* JANET CHANDLER, PhD.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Taxpayers Against Fraud, the False Claims Act Legal Center, is a nonprofit public interest organization dedicated to combating fraud against the federal government through the promotion of the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA" or "the Act"). It has a profound interest in ensuring that the Act is appropriately interpreted and utilized. The issue here is the applicability of the FCA to local government entities accused of defrauding the U.S. Treasury. Creation of municipal immunity from the FCA would gravely undermine the efficacy of the Act in policing fraud on the federal government by exempting from liability the cities and counties that receive hundreds of billions of dollars in federal funds.[1]

SUMMARY OF ARGUMENT

A corporation is a "person" that can be sued under the False Claims Act, 31 U.S.C. § 3729(a). That is a presumption expressly reaffirmed by this Court in *Vermont Agency v. United States ex rel. Stevens*, 529 U.S. 765, 782 (2000). It was well established when the FCA was enacted in 1863 that municipal corporations, like other corporations, were liable in court for their wrongs. *See Will v. Michigan*, 491 U.S. 58 (1989);*City of Newport v. Fact Concerts*, 453 U.S. 247 (1981); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). When Congress amended the FCA in 1986, it did not narrow that meaning of "person." Rather, it stated that it understood "persons" to include cities and counties. Therefore, counties such as Petitioner Cook County may be held liable under the FCA.

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief, which has been financed and prepared by *amicus curiae* and its counsel.

The common-law rule against imposing punitive damages on cities does not apply here because Congress designed and characterized the FCA's treble damages as *compensatory liquidated damages*, not as punishment. In 1986 Congress increased the FCA's double damages remedy, which this Court has always deemed compensatory, to treble damages, in order to ensure that the Treasury is made whole for the injuries wrought by false claims. Treble damages ensure full compensation for such things as the cost of discovery, investigation and prosecution of frauds, pre-judgment interest, and consequential damages. Congress expressly designated the FCA's treble damages as compensatory, not punitive, and that legislative judgment is entitled to judicial deference. *See United States v. Bornstein*, 423 U.S. 303 (1976); *Hudson v. United States*, 522 U.S. 93 (1997).

The FCA's treble damages bear none of the indicia of punitive damages, nor do they implicate the policy concerns about punitive damages that troubled this Court in *Newport v. Fact Concerts*. But even if the FCA's treble damages were to be deemed punitive, Congress has displaced the common-law rule against imposition of punitive damages. Congress did so in 1986 by deliberately increasing the Treasury's recovery to treble damages in the face of (1) the settled presumption that municipal corporations are "persons" liable under the Act, and (2) Congress's own express recognition in the legislative record that municipalities are "persons" under the Act.

To be sure, a treble damages judgment might be burdensome on a county. But one does not stumble innocently into FCA liability: it is imposed only for intentional fraud. When the choice as to who should bear the cost of that fraud is between the taxpayers of the county that perpetrated and benefitted from the fraud, and the innocent and injured taxpayers of the United States, Congress's choice is clear. And it is Congress, not the judicial branch, that the Constitution empowers to make that

choice. Petitioner asks this Court not just to shield cities and counties from treble damages, but to immunize them completely from *any* liability whatever under the False Claims Act. A decision immunizing Cook County from any and all FCA liability, on the basis of a common-law rule that Congress has overridden, would be a usurpation of legislative power.

ARGUMENT

I. COUNTIES ARE "PERSONS" SUBJECT TO LIABILITY UNDER THE FALSE CLAIMS ACT.

A. *Stevens* Reaffirmed That the FCA's Reference to "Persons" Presumptively Includes Counties.

Vermont Agency v. United States ex rel. Stevens, 529 U.S. 765 (2000), held that States could not be sued under the FCA due to the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780. "[C]omity and respect for our federal system demand that something more than mere use of the word 'person' demonstrate the federal intent to authorize" suit against a sovereign state. *Id.* at 780 n.9. "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan*, 491 U.S. 58, 65 (1989).

But no such "clear statement" rule protects "municipal corporations" because, unlike States, they are not sovereign. *Alden v. Maine*, 527 U.S. 706, 756 (1999). Therefore, "[t]here is certainly no constitutional impediment to municipal liability" under the FCA. *Monell v. Dept. of Social Services*, 436 U.S. 658, 690 n.54 (1978).

Indeed, *Stevens* explicitly reaffirmed that the "presumption with regard to corporations is *just the opposite* of the one

governing here: *they are presumptively covered by the term 'person.'*" 529 U.S. at 782 (emphasis added). "'[A]ny natural person, partnership, corporation, association, or other legal entity'" is "presumptively *covered* by the term 'person.'" *Id.* at 784 n.14 (original emphasis). The Court stressed that nothing in the text, structure or history of the FCA "cast[s] doubt upon the courts' assumption that §3729(a) extends to corporations." *Id.*

This Court has held many times that, like private corporate bodies, public corporations such as "municipalities are persons." *Will*, 491 U.S. at 70. *See also id.* at 69 n.9 ("towns, cities, and counties" are subject to suit); *Owen v. City of Independence*, 445 U.S. 622, 639 & n.19 (1980) (all "local governmental units" are subject to suit as "persons"); *Monell*, 436 U.S. at 687 ("the 'usual' meaning of the word 'person' would extend to municipal corporations"); *City of Newport v. Fact Concerts*, 453 U.S. 247, 259 (1981) ("a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity.").

B. Municipal Corporations, Like Other Corporations, Were Included Within the FCA's Reference to "Persons" When the Statute Was Enacted in 1863.

When the FCA was enacted it was hornbook law that "[t]here is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action." T. Shearman & A. Redfield, A TREATISE ON THE LAW OF NEGLIGENCE §120, p. 139 (1869) (quoted in *Owen*, 445 U.S. at 640). Furthermore, "this fact was well known to Congress" in the 1860s. *Monell*, 436 U.S. at 688. *See also id.* at 688 n.50 ("'Counties, cities and corporations of all sorts . . . have become thoroughly established to be an individual or person'") (Court's brackets and citation omitted).

Petitioner effectively asks the Court to revisit and reject this entire body of authority holding that counties are persons. Pet. Br. 13.[2] Petitioner concedes that cities and counties were understood to be "persons" in *1869*, but contends that this was not the case in *1863* when the FCA was enacted. *See* Pet. Br. 14-16. Perhaps something magical and revolutionary is supposed to have transpired in those six short years. Given that Petitioner asks this Court to replow old ground, it is remarkable that Petitioner did not survey that terrain more thoroughly itself: Petitioner's legal history is simply wrong.

As Chief Justice Lemuel Shaw wrote *in 1837*, "[t]hat an action sounding in tort, will lie against a corporation, though formerly doubted, *seems now too well settled to be questioned. And there seems no sufficient ground for a distinction in this respect, between cities and towns and other corporations.*" *Thayer v. City of Boston*, 36 Mass. 511, 516 (1837) (emphasis added).[3]

This Court's own decisions – the ones Petitioner carefully avoids – confirm that cities and counties were liable (just like other corporate persons) long before 1863. In *Owen*, *citing cases from as early as 1825*, decades before the FCA was enacted, this

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[2] Curiously, Petitioner discusses only the *Monell* decision and fails to mention, much less distinguish, the similar holdings in *Owen*, *Will*, and *Newport*. *See* Pet. Br. 13-14.

[3] *See also Town Council of Akron v. McComb*, 18 Ohio 229, 230 (1849) (holding that "a municipal corporation is liable for an injury resulting to the property of another," and rejecting the assertion that such a ruling "introduced a new doctrine in reference to corporations, opposed to the current of authorities, and of doubtful propriety"); *Elliot v. Concord*, 27 N.H. 204, 208, 209 (N.H. 1853) ("the general policy of the law . . . is to subject the town to the action of the party who suffers damage," and "it cannot admit of question that the town is liable, in the first instance, to the sufferer" as any other defendant would be).

Court recognized that counties "were treated as natural persons for virtually all purposes of constitutional and statutory analysis. . . . Local government units were regularly held to answer in damages for a wide range of statutory and constitutional violations." 445 U.S. at 639 & n.19. "[I]t was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals." *Id.* at 640.[4]

Among the cases cited by *Owen* was *Commissioners of Knox County v. Aspinwall*, 62 U.S. 539 (1859). *Knox County* was a federal suit against a county for failure to pay interest on municipal bonds. 62 U.S. at 540. The dissent objected that the suit could not be brought because the defendant was a municipal corporation, *id.* at 546, but the Court dismissed this argument as a "minor point[] . . . which we have considered, but which it is not important should be particularly noticed." *Id.* at 546.[5]

---

[4] It is hardly surprising that private and public corporations were treated alike in this regard, because both corporate forms were created in the same way: by the grant of a charter from the sovereign. If anything, municipal corporations *preceded* private corporations. Most eighteenth century corporations were "cities or boroughs," L. Friedman, A HISTORY OF AMERICAN LAW 166 (1973), and "the archetypal American corporation of the eighteenth century [wa]s the municipality . . . in the nineteenth century it [wa]s the modern business corporation." M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 112 (1977). One of the natural incidents of corporate status was the ability to sue and be sued like other persons. Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, specified that the non-sovereign corporate bodies established thereunder could sue and be sued. *See* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 36 (W. Swindler ed. 1975) (Massachusetts); 2 *id.* at 131 (Connecticut); 8 *id.* at 363 (Rhode Island); 2 *id.* at 434 (Georgia).

[5] In *Owen* this Court also relied upon *Mayor, Aldermen, and Commonalty of the City of New York v. Ransom*, 64 U.S. 487, 489 (1860) (upholding a patent infringement suit brought by an individual against the city in federal court); *Inhabitants of Searsmont v. Farwell*, 3 Me. 450, 452 (1825) (holding a town liable at common law for breach of contract

In *Newport v. Fact Concerts, citing cases from as early as 1846*, this Court stated that "it was generally understood" that "a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity." 453 U.S. at 259.[6]

Petitioner arrives at the opposite (and erroneous) conclusion about municipal liability because Petitioner confuses the issue of *liability* with the issue of *jurisdiction.* The former question asks whether a municipal corporation can be sued as a party; the latter asks how one pleads federal diversity jurisdiction over a corporate entity: need one aver only the State of the defendant's incorporation, or must one also aver the State residence and citizenship of each of the corporation's individual corporators? *See* Pet. Br. at 14-16 (discussing corporate status "for purposes of jurisdiction" in "federal courts"). That issue has no bearing on this case.[7]

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damages); and *Paul v. School Dist. No. 2*, 28 Vt. 575 (1856)(damages action against a municipal school district for wrongful discharge and breach of contract).

[6] Among the cases cited by *Newport* were *City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116 (1858), and *M'Gary v. President & Council of the City of Lafayette*, 12 Rob. 668 (La. 1846). *Montgomery* considered the proposition that municipal corporations were persons that could be held liable for negligence and found it to be "consistent with reason, demanded by justice, and supported by a preponderance of authority." 33 Ala. at 130. *M'Gary* held a municipal corporation liable, and further held that the plaintiff was entitled to full damages because the defendant's status as a public corporation was no basis on which to limit the plaintiff's recovery "to a bare indemnity." 12 Rob. at 668-69, 674.

[7] The cases Petitioner discusses all involved questions of pleading federal diversity jurisdiction over corporations and did not purport to cast doubt on the settled proposition that municipal corporations could be sued in any court wherein the plaintiff could obtain jurisdiction. *See Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86-87, 91-92 (1809); *Louisville, Cincinnati and Charleston R.R.Co. v. Letson*, 43 U.S. (2 How.) 497, 554

C. As *Stevens* Held, Congress Did Not Narrow the Meaning of "Persons" When it Amended Other Language in the FCA in 1986.

Stevens held that Congress made no significant changes to the operative language of §3729(a) in 1986 and, therefore, that the 1863 understanding of the term "person" continues to govern interpretation of the FCA. The "term 'person' has remained in the statute unchanged since 1863; the 1986 amendment merely changed the modifier '[a]' to 'any.'" 529 U.S. at 783 n.12 (brackets by the Court).

The legislative history confirms that Congress understood the 1863 FCA to reach counties that defraud the federal government: "The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States *and political subdivisions thereof.*" S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986) (emphasis added). *Stevens* stated that this report sets forth Congress's understanding of the meaning of the original FCA, as enacted in 1863, 529 U.S. at 783 n.12, under which cities *had* (contrary to Petitioner's misrepresentations) been defendants in FCA actions. *See, e.g., United States v. Bd. of Educ. of Union City*, 1985 U.S. Dist. LEXIS 14917 (D.N.J. Oct. 15, 1985). This passage therefore negates any insinuation that Congress, in 1986, intended to narrow the term "person" or otherwise disturb the long-established understanding that "person" includes counties.

To be sure, *Stevens* made plain that the Senate Report was mistaken in its historical conclusion that *States* were "persons" under the FCA in 1863. 529 U.S. at 783 n. 12. The sovereign immunity of states, established by the Eleventh Amendment and centuries of legal tradition, cannot be overturned without a clear

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(1844); *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121-22 (1869).

statement in the statutory text; a single sentence from a legislative report will not suffice. *Id.* at 780-81 & n.9; 783 n.12. But, as *Stevens* itself reiterated, with respect to *municipalities* the presumption is precisely *opposite*: that they *are* persons. *Id.* at 782. As the court below explained, "while the committee report was incorrect with respect to the liability of states under the FCA before 1986, we believe it was correct in asserting that political subdivisions of states were, and are, subject to suit under the FCA so long as they are not properly considered arms of the state itself." *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 975 n.8 (7th Cir. 2002).

The Senate Report confirms that Congress's intent in amending the FCA in 1986 was to adhere to this long settled statutory interpretation. The point is *not* that the 1986 Senate Report tells us what the 1863 Congress intended – it does nothing of the sort. Rather, it tells us that the 1986 Congress fully understood that cities and counties had always been "persons" subject to the FCA, and that Congress nevertheless deliberately increased the remedy to treble damages. Thus did Congress override the common-law rule against imposition of punitive damages, as explained in Part II.B. below.

If anything, the 1986 amendment to § 3729(a) *broadened* the meaning of "person." As the *Stevens* Court noted, the indefinite article "a" was changed to "any," and the Act thus reaches "any person" without qualification. 529 U.S. at 783 n.12. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Because the term "any" imports "no restriction," *United States v. Turkette*, 452 U.S. 576, 580 (1981), or "limitation," *Int'l Union of Operating Engineers v. Flair Builders*, 406 U.S. 487, 491 (1972), it "leaves no doubt as to the congressional intention to include all" members of the category identified by the enactment. *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945).

This analysis is buttressed by the settled proposition that Congress intended the FCA to be broadly construed. *See* S. Rep. No. 345 at 7-8, 11; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) ("'The statute is a remedial one. . . . and should be construed accordingly.'"). In *Monell* the Court explained how this rule of broad construction is to be applied to the precise question presented here:

> since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [the statute], and, further, since Congress intended [the statute] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of [the statute].

436 U.S. at 685-86.

Therefore, the 1986 amendments and their legislative history establish that Congress did not narrow the definition of "person" to exclude the counties and cities that had always been understood to be included in the Act.

II. FCA Treble Damages Apply to All "Persons" Liable under the Statute, Including Counties.

Neither the Eleventh Amendment nor the principle of sovereign immunity extends to municipal corporations, hence there is no absolute rule immunizing counties from punitive damages. There is only a presumption against such liability, derived from the common law and used by this Court as an aid in statutory interpretation. *See Newport*, 453 U.S. at 263; *Stevens*, 529 U.S. at 785. Whether that common-law immunity applies under the FCA is a question of "statutory construction," *Owen*, 445 U.S. at 635, and requires a "careful inquiry into considerations of both history and policy." *Newport*, 453 U.S. at

259. If there is "evidence that Congress intended to disturb the settled common-law immunity," that congressional intent is controlling. *Newport*, 453 U.S. at 266.[8]

This Court should affirm the ruling below, that FCA treble damages may be imposed on counties, for three independent reasons: (1) the common-law presumption against imposing punitive damages on cities does not apply here, because Congress designed the FCA's treble damages remedy as compensation rather than punishment and that legislative judgment is entitled to judicial deference; (2) Congress in any event displaced the presumption when it enacted an elaborate, carefully crafted damages regime for the FCA; and (3) the policies that weigh against imposition of punitive damages, which this Court reviewed in *Newport*, are not implicated by the FCA treble damages provisions.

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[8] *Newport* quoted *Pierson v. Ray*, 386 U.S. 547, 555 (1967), to the effect that "'Congress would have specifically so provided had it wished to abolish'" a particular immunity doctrine. 453 U.S. at 263. But neither *Newport* nor *Pierson* in fact required Congress to disavow a common-law rule in so many words. Accordingly, this Court has repeatedly held that it is enough that the "legislative record" provide "clear indication" of Congress's intent to establish a different rule. *Pierson*, 386 U.S. at 554. *See also Newport*, 453 U.S. at 263-64 (common-law immunity may be overridden by congressional "intent' as revealed in "legislative debates" and "legislative history"); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (question is whether "Congress thought it had exercised the power" to establish the liability in question).

A. The Common-Law Presumption Against Imposing Punitive Damages On Cities Does Not Apply, Because Congress Designed the FCA's Treble Damages Remedy To Be Compensatory Rather than Punitive, And That Congressional Judgment Is Entitled To Deference.

Petitioner appears to labor under the misapprehension that the FCA was required to contain a phrase such as "we hereby set aside common-law municipal immunity and impose punitive damages on cities." Pet. Br. 22. As explained above, pages 10-11 & note 8, that is not the legal standard. But even if it were, there is a more immediate reason why Congress did not utter any such incantation to set aside the presumption against *punitive* damages: Congress designed the FCA's treble damages to be *compensatory*, not punitive, and the presumption is therefore simply inapplicable. Congress's characterization of the FCA's treble damages as compensatory is entitled to substantial deference.

1. Before *Stevens*, the FCA had always been understood by this Court as compensatory, and this Court has likewise characterized some treble damages regimes as compensatory rather than punitive.

As this Court acknowledged in *Stevens*, it has consistently held that the double damages imposed by the original 1863 FCA "were remedial rather than punitive." 529 U.S. at 785. In *Hess*, the Court squarely held that FCA "proceedings are remedial." 317 U.S. at 549. Compensation was the legislative purpose, and "the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *Id.* at 551-52. In *United States v. Bornstein*, 423 U.S. 303, 315 (1976), the Court confirmed "this make-whole purpose" of the FCA's double damages provision: "this method of

computation comports with the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims." In *United States v. Halper*, 490 U.S. 435 (1989), *overruled on other ground by Hudson v. United States*, 522 U.S. 93 (1997), the Court explained that "proceedings under the statute were remedial and designed to 'protect the government from financial loss'— rather than to 'vindicate public justice.'" 490 U.S. at 444.[9]

The argument that the FCA's treble damages trigger the common-law presumption against imposition of punitive damages on counties is predicated on a passage in *Stevens* wherein this Court remarked that treble damages "are essentially punitive in nature," 529 U.S. at 784. Given that the result in *Stevens* was compelled by the principles of State sovereign immunity, the Court had no occasion to elaborate further and no occasion to examine Congress's findings on FCA treble damages. Furthermore, if *Stevens*' reference to treble damages were understood as a holding that *all* treble damages are *necessarily* punitive, it would be in tension with cases in which

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[9] It has been argued that the justification for doubling damages in the 1863 FCA was to offset the portion of the recovery (50%) that went to a successful *qui tam* relator under the original Act. *See* Brief *Amicus Curiae* of Delaware County at 7. But this Court has already rejected this point. First, double damages were awarded even when the United States brought suit itself, in which case the Treasury received every nickel of the judgment. Second, the relator's portion of any award was cut to a maximum of 25% in 1943, and Congress placed other restrictions on *qui tam* actions, yet "[i]n adopting these changes, Congress did not make any adjustment in the double-damages provision, again suggesting that it thought that double damages are *necessary to make the United States whole* in fraudulent claim cases." *Bornstein*, 423 U.S. at 316 n.11 (emphasis added).

this Court has held that some treble damage regimes must be understood as primarily compensatory.[10]

The question of whether (and for which purposes) a particular treble damages regime should be deemed punitive or remedial is a subtle one not susceptible to hasty categorical resolution. *Amicus* Taxpayers Against Fraud therefore suggests that *Stevens'* characterization of FCA treble damages must be understood in light of the Court's interpretive presumption in that case—dictated by the Eleventh Amendment—that sovereign States are not "persons" under the FCA. That consideration carries no weight where, as here, the Court has confirmed that the *opposite* interpretive presumption applies — *i.e.*, private and municipal corporations *are* "persons" under the FCA.

2. The legislative analysis prescribed by *Newport* reveals that Congress imposed treble damages to ensure full compensation for the U.S. Treasury, rather than as a punitive measure.

The legislative record reveals that Congress amended the FCA in 1986 to increase recoverable damages from double to

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[10] *See, e.g.*, *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 757-76 (1982) (unlike punitive damages, antitrust treble damages can be imposed on an agency theory because "the antitrust private action was created primarily as a remedy for the victims of antitrust violations"); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485-86 (1977) (although antitrust treble damages "play an important role in penalizing wrongdoers . . . it is nevertheless true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy"); *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151 (1987) ("Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees . . . Moreover, both statutes aim to compensate the same type of injury").

triple the amount of the fraud specifically "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345 at 1. *See also* H.R. Rep. No. 660 at 16. Congress stressed that the remedies available under the 1863 Act were in dire need of modernization. *See* S. Rep. No. 345 at 2, 4; H.R. Rep. No. 660 at 63; 132 Cong. Rec. H6479 (Sept. 9, 1986) (statement of Rep. Glickman); *id.* (statement of Rep. Brooks). As Representative Rodino explained, "This statute has existed for 123 years but is out of date and no longer an effective tool for prosecution of civil fraud cases." 132 Cong. Rec. H6482.

Accordingly, the 1986 amendment increased the damages recoverable in order to "provide the Government with a more effective tool for the recovery of the dollar losses suffered through fraud." *Id.* In concluding that, "[b]ecause of this lapse of time, some of the provisions of the Act are outdated," the House Report specifically noted the deleterious effects of a century of inflation on the adequacy of the FCA's double damages remedy. H.R.Rep. No. 99-660 at 17. Congress concluded that treble damages were necessary to *"make the Government whole for its losses*; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation." *Id.* at 20 (emphasis added).

No change in the remedial character of the FCA's damages was either intended or inadvertently wrought by Congress in the 1986 Amendments. Congress *expressly* reaffirmed that "'[t]he statute is a *remedial* one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly.'" S. Rep. No. 345 at 11 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)) (emphasis added). Congress *expressly and repeatedly rejected* the proposition that the FCA treble damages regime was punitive in nature: "False Claims Act proceedings are civil and *remedial* in nature and are brought to recover *compensatory*

damages." S. Rep. No. 345 at 31 (emphasis added). *See also id.* at 31 (FCA is "remedial," "notwithstanding the fact that the Act permits a treble recovery," and therefore appropriate standard of proof is preponderance of the evidence); H.R. Rep. No. 660, 99th Cong., 2d Sess. 25 (1986) ("The False Claims Act is basically a remedial statute").

Not one of the briefs submitted by Petitioner and its *amici*, nor any decision striking down the FCA's application to municipalities, even mentions these congressional findings.

This Court has long endorsed a standard of "rough remedial justice" under the FCA. *Halper*, 490 U.S. at 446. When fraud has been committed on the Treasury, "the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain." *Id.* at 449. *See also Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956) (same). This Court has therefore held that the government "may demand compensation according to somewhat imprecise formulas." *Halper*, 490 U.S. at 446. The FCA's damages multiplier "is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss." *Rex Trailer*, 350 U.S. at 153. Because the damages resulting from a fraud on the public fisc "may be difficult or impossible to ascertain, . . . it is the function of liquidated damages to provide a measure of recovery in such circumstances." *Id.* at 153-54.

Therefore, this Court has unanimously declared that "[l]iquidated-damage provisions, when reasonable, are not to be regarded as penalties." *Rex Trailer*, 350 U.S. at 151. The Court has further held that the FCA's multiple damages remedy "does not rise to the level of 'punishment' merely because Congress provided for civil recovery in excess of the Government's actual damages." *Halper*, 490 U.S. at 442. Indeed, this Court stated in *Hess* that "*Congress might have provided here . . . for recovery of 'threefold damages.*' . . . This Court has noted the general

practice in state statutes of allowing double or treble or even quadruple damages." 317 U.S. at 550-51 (emphasis added). All of this is a matter of legislative discretion.

This Court has also repeatedly endorsed Congress's goal of "afford[ing] the government complete indemnity for the injuries done it." *Hess*, 317 U.S. at 549. *See also Halper*, 490 U.S. at 445 (same); *Bornstein*, 423 U.S. at 315 & n. 11 (same); *Rex Trailer*, 350 U.S. at 152 (same). Those injuries include "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse." *Halper*, 490 U.S. at 445. *See also id.* at 446 n.6 ("prosecutorial costs . . . must also be factored into the determination"). Since the government does not get a separate award of attorneys' fees or investigative costs in an FCA suit, the trebling of damages is readily understood as a means of roughly approximating the total losses inflicted on the government by the defendant's fraud.[11] Nor does the FCA provide the government with a separate award of pre-judgment interest to compensate the Treasury for the carrying costs or opportunity costs imposed by public fraud. Again, treble damages make up for that.

Furthermore, the trebling of FCA damage awards compensates the federal government for the consequential damages flowing from a fraud on the public fisc. The FCA

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[11] Although an FCA defendant "shall also be liable to the United States Government for the costs of a civil action to recover any such penalty or damages," 31 U.S.C. 3729(a), those "costs" do not include attorneys' fees or the costs of the government's investigation. The relator in a successful *qui tam* action may recover "an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs," 31 U.S.C. 3730(d)(1), but those recoveries do not make the government whole because they go to the relator.

makes no separate award for such consequential injuries. Indeed, Congress enacted the treble damages provision in 1986 as an alternative to adding consequential damages to the prior statute's award of double damages.

The original House version of the bill proposed in 1986 provided for a separate award of consequential damages on top of the doubling of actual damages. *See* S. Rep. No. 345 at 39; 132 Cong. Rec. H6479 (statement of Rep. Glickman); *id.* (statement of Rep. Brooks). Consequential damages were favored by the House so that the FCA would "make the Government whole for its losses; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation." H.R. Rep. No. 660 at 20. *See also* 132 Cong. Rec. H6480 (statement of Rep. Fish) (the House bill "would make consequential damages the measurement standard — thus allowing a recovery for indirect losses that are the result of the fraud as well as actual direct losses. This is a realistic, fair change which ensures the recovery will reflect actual replacement cost in every instance."). In the subsequent conference between the House and Senate, a compromise was reached that deleted consequential damages and substituted treble damages. *See* 132 Cong. Rec. S11238 (Aug. 11, 1986) (statement of Sen Dole); 132 Cong. Rec. S15036-37 (Oct. 3, 1986) (statement of Sen. Grassley); 132 Cong. Rec. H9388 (Oct. 7, 1986) (statement of Rep. Glickman).

Therefore, the treble damages provision of the FCA should be understood as doing nothing more than "afford[ing] the government complete indemnity for the injuries done it," *Hess*, 317 U.S. at 549, including the costs of investigation, attorneys' fees, pre-judgment interest, and consequential damages. Surely the taxpayers and the Treasury are entitled to nothing less.

In both *Stevens* and *Newport*, this Court defined punitive damages as damages "'beyond that amount which will be

sufficient for [the injured party's] indemnification.'" *Stevens*, 529 U.S. at 785 n.15 (citation omitted); *Newport*, 453 U.S. at 261 (same). Because the treble damages provision is nothing more than a full indemnity, it cannot, by definition, be deemed punitive. It therefore does not implicate a municipality's common-law immunity from punitive damages.

3. Congress's characterization of the FCA as non-punitive is entitled to judicial deference.

This Court has indicated that congressional judgments about the damages necessary to make the Treasury whole are entitled to judicial deference. Damages under the FCA are to be calculated and characterized in the way that "most faithfully conforms to the language and purpose of the Act." *Bornstein*, 423 U.S. at 314. To determine whether double damages were a remedy or a punishment in *Bornstein*, the Court inquired into what "Congress intended." 423 U.S. at 314. The Court expressly adopted an understanding of the FCA that "comports with the *congressional judgment* that double damages are necessary to compensate the Government completely." *Id.* at 315 (emphasis added).

In *Hudson v. United States*, 522 U.S. 93, 103-04 (1997), a case involving the Fifth Amendment's ban on double jeopardy, this Court unanimously held that courts should defer to the congressional characterization of a statute as civil and remedial rather than criminal and punitive. The touchstone for such determinations is what "Congress intended" with respect to the statute's penalties, *id.* at 103, and that intention governs unless the party challenging the law adduces "the clearest proof" that Congress mischaracterized its own enactment, *id.* at 104. Accordingly, the *Hudson* Court refused to deem a statute's penalties "'so punitive in form and effect as to render them criminal *despite Congress' intent to the contrary*.'" 522 U.S. at 104 (emphasis added).

If courts are required, even in the context of the Fifth Amendment's Double Jeopardy Clause, to give great weight to Congress's own characterization of a statute as civilly remedial or criminal punitive, and to overrule that determination only upon the "clearest proof," then *a fortiori* the courts should defer to a congressional judgment as to whether a statute is remedial or punitive when, as in the case at hand, no constitutional right is at stake. As the Court has repeatedly concluded with respect to the FCA, the "inherent difficulty of choosing a proper specific sum which would give full restitution was *a problem for Congress*." *Hess*, 317 U.S. at 552 (emphasis added); *Rex Trailer*, 350 U.S. at 152 (same).

Here there is no evidence, let alone "the clearest proof," that Congress's characterization of the FCA's treble damages as remedial was either arbitrary or inaccurate. "It could not be more clear that Congress, in adopting this approach, addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute." *Chandler*, 277 F.3d at 978. And it was Congress's manifest judgment that the treble damages available under the 1986 Amendments are compensatory.[12]

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[12] Prior to this Court's statement in *Stevens*, the Courts of Appeals had consistently reached the same conclusion. *See United States v. Peters*, 110 F.3d 616, 517 (8th Cir. 1997) ("the FCA's treble-damages provision, which went into effect in 1986, is likewise in the nature of rough remedial justice and therefore not punitive for double-jeopardy purposes."); *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996) ("Although the False Claims Act authorizes treble damages . . . [a] multiple recovery of this type is compensatory rather than punitive, even though it contains a penalty element, unless the amount sought by the government 'bears no rational relation to the goal of compensating the Government for its loss'"), *cert. denied*, 520 U.S. 1132 (1997); *United States v. Barnette*, 10 F.3d 1553, 1559-60 (11th Cir.) (award of treble damages under the FCA does "'no more than make the Government whole'" and is non-punitive "rough justice"), *cert. denied*, 513 U.S. 816 (1994). These decisions were not discussed in *Stevens*.

To be sure, the FCA's treble damages also have a deterrent effect. *See* H.R. Rep. No. 660 at 20. But that does not mean that treble damages are inherently punitive. As this Court has noted with respect to the FCA, "for the defendant even remedial sanctions carry the sting of punishment." *Halper*, 490 U.S. at 447 n.7. Since defendants would prefer not to pay for their wrongs, even the imposition of compensatory damages deters misconduct. Hence there are no "'solely' remedial (i.e., entirely nondeterrent)" damages. *Hudson*, 522 U.S. at 102. Deterrence and punishment are not the same thing. *See Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("Forfeiture . . . serves a deterrent purpose distinct from any punitive purpose"); *Hudson*, 422 U.S. at 105 (same). Thus in *Bornstein* this Court held that the FCA's double damages were remedial, not punitive, 423 U.S. at 314-15, while simultaneously holding that the damages should be doubled prior to the deduction of any offset amounts, because "[t]his method of computation . . . maximizes the deterrent impact of the double-damages provision," *id.* at 317.

There are other indicia of punitive damages that FCA treble damages do not display, and that therefore confirm that Congress's characterization of FCA damages as compensatory is appropriate. First, unlike FCA damages, punitive damages are a separate element of a judgment, imposed in accord with separate jury instructions, that are added on top of the initial award of compensatory damages. *See Newport*, 453 U.S. at 252-53 (describing jury instructions on punitive damages); *id.* at 256 n.12 ("we deal with a wholly separable issue of law, on which the jury rendered a special verdict"); *id.* at 267 ("These damages are assessed over and above the amount necessary to compensate the injured party."). Punitive damages are expressly imposed as punishment, and they are tailored to punish the particular defendant before the court, with the goal that the amount be sufficient to sting *this* defendant. *See Newport*, 453 U.S. at 270 ("evidence of a tortfeasor's wealth is traditionally admissible as

a measure of the amount of punitive damages that should be awarded").

The FCA's treble damages are nothing like this. They are imposed as one lump sum and are not divided into compensatory and punitive elements. There is no attention paid to the resources of the particular defendant when calculating FCA damages; damages are simply tripled in every case, as a form of liquidated damages to assure full compensation for the government.

Second, the Court has stressed that punitive damages are "'evidently vindictive,'" *Stevens*, 529 U.S. at 785 n.15; *Newport*, 453 U.S. at 261, and are meant to punish those who act with "malice," *Newport*, 453 U.S. at 261, 262, 267. Accordingly, *Newport* held that punitive damages were unavailable against cities under 42 U.S.C. § 1983 because a government entity "can have no malice independent of the malice of its officials" and therefore such damages "are not sensibly assessed against the governmental entity itself." 453 U.S. at 267.

In contrast, there is nothing insensible or incongruous about imposing FCA treble damages on counties because there is no "malice" requirement under the FCA. Indeed, when amending the FCA in 1986, Congress expressly rejected any sort of scienter requirement, whether malice or any other "specific intent to submit the false claim," as wholly out of place in what Congress deemed a "remedial" statute. S. Rep. No. 345 at 7. *See also id.* at 13, 20-21, 31; H.R.Rep.No. 660 at 20-21; 31 U.S.C. § 3729(b) (1986) ("no proof of specific intent to defraud is required").

Therefore, FCA treble damages are not punitive. Congress amended the FCA to impose treble damages in order to assure full indemnity for the U.S. Treasury — the rough remedial justice that this Court has repeatedly endorsed as compensatory, not punitive. Because the FCA's treble damages are not

punitive, they do not implicate the common-law presumption against imposition of punitive awards on cities that concerned the Court in *Newport*.

B. Congress Deliberately Imposed Treble Damages On All FCA Defendants, Including Counties, Thereby Overriding Any Common-Law Immunity.

As explained above, this Court has held that congressional intent controls. The search is for "evidence that Congress intended to disturb the settled common-law immunity" by imposing punitive damages. *Newport*, 453 U.S. at 266. This inquiry yields a different answer in this case than in *Newport*.

In *Newport* there was no indication that Congress intended to impose punitive damages. Indeed, 42 U.S.C. § 1983 is entirely silent on the question of what damages are available: it states only that defendants shall be "liable to the party injured in an action at law." *See Newport*, 453 U.S. at 258 n.17. Because Congress had not specified which damages remedies were available, this Court turned to the common law for guidance in filling in the blanks. *See id.* at 267-68; *cf. Carey v. Piphus*, 435 U.S. 247, 255-58 & nn. 11, 13 (1978). It made perfect sense to hold that the same body of common law that made punitive damages available under § 1983 also limited the population of defendants on whom such damages could be imposed. As the Court noted, the "general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Newport*, 453 U.S. at 261 n. 21 (*quoted in* Pet. Br. 24-25).

Newport dictates the opposite result in this case, because in the FCA Congress "expressly authorized" treble damages "by statute." There is no question that Congress "specifically provided" for treble damages. *Pierson v. Ray*, 386 U.S. at 555; *Newport*, 453 U.S. at 263. "Unlike § 1983, the FCA does not need to borrow a common-law conception of damages; Congress

has provided a clear and consistent remedy for all violations of the FCA." *Chandler*, 277 F.3d at 978.

As demonstrated above, the structure and legislative history of the 1986 FCA Amendments reveal painstaking legislative attention to the goal of making the Treasury whole for frauds and the need for updating a century-old statutory remedy. Congress knew how to limit recovery to the previous level of double damages when it deemed it appropriate. *See* 31 U.S.C. § 3729(a)(7)(A)-(C) (providing that double rather than treble damages may be imposed when the person who defrauded the Government cooperates before learning of the investigation). "It could not be more clear that Congress, in adopting this approach, addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute." *Chandler*, 277 F.3d at 978.

Congress carefully crafted its treble damages remedy with the express understanding that municipal corporations, like private corporations, were "persons" subject to the FCA. Indeed, as shown above, Congress explicitly noted that it was acting on the premise that the FCA's reference to "person" included "political subdivisions" of States. S. Rep. No. 345 at 8. *See* Part I.C., *supra*. With that interpretation of § 3729(a) in mind, Congress deliberately increased the remedy to treble damages and thereby overrode any contrary common-law rule.

The only alternative explanation is that Congress, in a fit of legislative sleepwalking, increased damages from double to treble and *sub silentio* exempted cities and counties from the False Claims Act *entirely*. This is Petitioner's theory, *see* Pet. Br. 21, and it is absurd.

Thus, even assuming *arguendo* that the FCA's treble damages are to be considered punitive, it is manifest that Congress "thought it had exercised the power" to impose treble

damages. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Therefore, the common-law presumption that cities are not subject to punitive damages has been displaced by Congress's deliberate imposition of treble damages in the 1986 FCA Amendments.

C. The FCA's Treble Damages Do Not Implicate The Policy Objections To Punitive Damages That Concerned This Court In *Newport v. Fact Concerts*.

Even absent evidence of congressional intent to override the presumption against imposing punitive damages on cities, the presumption on its own terms, as explained by this Court, does not constitute a universally applicable policy. Thus, after deciding in *Newport* that there was no evidence that Congress intended to disturb the common-law immunity, the Court stated that it would proceed to "determine whether considerations of public policy dictate a contrary result." 453 U.S. at 266. The Court concluded that it would be "unwise" to allow a punitive award against a city "[a]bsent a compelling reason . . . not present here." 453 U.S. at 271.

In the case at hand we have a compelling public policy reason established by Congress itself — securing full indemnity for frauds committed on the United States by a non-sovereign city or county. In contrast to *Newport*, the victim in this case is not a single party but We the People, and if a fraud is found at trial treble damages will be appropriate to achieve the compelling congressional objective of ensuring that the U.S. Treasury is made whole.

With respect to the policies that weigh against imposition of punitive damages on a city, *Newport* distinguishes itself. The Court expressed its aversion to imposing punitive damages on cities under § 1983 because of the "windfall to a fully compensated plaintiff." 453 U.S. at 267. In the first place, as

explained above, in the judgment of Congress the Treasury is not fully compensated without treble damages. This distinguishes an FCA award from a punitive award that, by definition, is added on top of the fully adequate compensatory award. In enacting the larger damages remedy in 1986, Congress "addressed the situation with careful precision" and "specifically determined" that treble damages are "necessary for the effective operation of the FCA." *Chandler*, 277 F.3d at 978.

Second, in contrast to punitive damages regimes where an already fully compensated plaintiff may reap a windfall when a court diverts to him a punitive award that serves the public law function of visiting society's punishment, under the FCA the Treasury, having borne the full weight of the defendant's fraud, is also the recipient of every dime of damages whenever the United States brings suit.

To be sure, if an FCA suit is brought under the statute's *qui tam* provisions, a successful relator will end up with some portion of the total damage award. But the relator's portion is not an arbitrary allocation made on an ad hoc basis. It is statutorily prescribed (in great detail) and judicially policed. *See* 31 U.S.C. § 3730(d). The briefs of Petitioner and its *amici* (whose ranks include cities and counties accused of defrauding the federal government) display great distaste for *qui tam* lawsuits. *See* Pet. Br. 36-37, Brief *Amicus Curiae* of Nat'l Ass'n of Counties *et al.* at 11, 13-14; Brief *Amicus Curiae* of 43 Local Gov't Airport Proprietors at 11. But regardless what FCA defendants may think, *Congress* saw a need for this particular remedy, and that is the end of the matter. The *qui tam* provision

> "was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill

> will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel."

Hess, 317 U.S. at 541 n.5.

Therefore, the relator's share that generates successful FCA lawsuits cannot be considered an instance of waste or diversion of public funds, nor may federal courts disparage or act in derogation of the FCA on the basis of Congress's endorsement of the *qui tam* mechanism. "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the . . . statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours." *Hess*, 317 U.S. at 541 n.5.

The *Newport* Court was also concerned that punitive awards against cities under § 1983 could be unpredictable, given: (1) the "broad discretion traditionally accorded to juries in assessing the amount of punitive damages;" and (2) the fact that, because "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." 453 U.S. at 270. These concerns do not exist under the FCA. Neither judge nor jury has unbridled discretion to set punitive damages under the FCA because there are no separate punitive awards: damages are trebled by statutory mandate. No runaway juries are possible and there is no consideration of the defendant's wealth or taxing power.

An FCA judgment against a county could indeed be substantial – *but only if the defendant county's fraud on the U.S. Treasury were substantial*. And in that event the damages visited upon the defendant would be proportionate to the totality of the injury inflicted on the Treasury by the defendant's fraud.

A defendant's complaints about the size of an adverse judgment are entitled to no weight where the "exceptional magnitude of those consequences is the product" of "the immensity" of the underlying transaction and wrongdoing. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 34 (1987) (Stevens, J., concurring). As demonstrated above, the FCA imposes treble damages to ensure that the U.S. Treasury is *made whole* (including interest, investigative and prosecutorial costs, and consequential damages). It is not a cause of action for unjust enrichment against counties and their constituents, and therefore mere disgorgement of improperly obtained federal funds is not the measure of damages.

Petitioner and its *amici* voice concerns that counties forced to compensate the U.S. Treasury fully for their frauds might have to cut back on local services. Of course, the municipal services that Petitioner refers to are usually subsidized by federal funds. Indeed, Petitioner and its *amici* confirm the need for rigorous enforcement of the FCA by describing the wide range of local services – from airports to police – for which cities use federal dollars (and for which cities have been sued by the federal government for fraud). Enforcement is essential to ensure that those scarce federal dollars are not squandered through fraud. If cities choose to ask for federal money, they must take such funds on the terms Congress chooses – and one of those conditions is that cities not defraud the U.S. Treasury, and be subject to treble damages if they do. "As conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to 'fix the terms on which it shall disburse federal money to the States.'" *New York* v. *United States*, 505 U.S. 144, 158 (1992).

The taxpayers of a city or county found to have defrauded the federal government might well feel the pinch of an FCA judgment in terms of increased taxes or decreased services. But (contrary to the argument of *Amicus Curiae* Orange Cty. at 15)

a municipal corporation does not innocently and inadvertently stumble into fraud any more than a private corporation does. Liability under the FCA is not a trap for the unwary: liability is imposed not for mere mistakes, but only for acts of fraud that are knowing, intentional, and willful. 31 U.S.C. §§ 3729(a)(1), (a)(2), (a)(4), (a)(5), (a)(6) & (a)(7).

It may well be regrettable that taxpayers who had no direct part in the frauds of their county officials will suffer the indirect cost of remedying those frauds. But the same is true of innocent employees thrown out of work when their corporate employers are held liable for treble damages under the FCA. Moreover, if the county that commits fraud is not to be held liable for the full cost of the injury it has inflicted upon the Treasury, upon whom should that unavoidable cost be imposed? As Petitioner and its *amici* concede, the taxpayers of that county are the ones who, even if they were not active parties to their county's fraud, nevertheless benefitted from that fraud insofar as their county reaped an undue and indeed fraudulent increase in federal tax support for the county's programs, an increase which redounded to those taxpayers in the form of lower county taxes and enhanced county services. *Amicus* Nat'l Ass'n of Public Hospitals at 19; *Amicus* 43 Local Gov'ts at 10; *Amicus* Orange Cty. at 11; Pet. Br. 35. When the choice as to who should bear the cost of that fraud is between the hapless taxpayers of the county that perpetrated and benefitted from the fraud, and the innocent and injured taxpayers of the United States, Congress's choice is clear. And it is Congress, not the judicial branch, that the Constitution empowers to make that choice.

It cannot be overemphasized that the result urged by Petitioner and its *amici* would negate *any* FCA liability for cities and counties that commit intentional fraud on the U.S. Treasury. *See* Pet. Br. 25 (total "immunity from suit"); *id.* at 37 ("absolute governmental immunity"). This, despite the fact that Petitioner and its *amici* concede that "'a local government can properly be

made to pay compensation for the wrongful acts of its agents.'" Pet. Br. 35. *See also Amicus* Orange Cty. at 11. Petitioner hastens to reassure the Court that other legal mechanisms, including common law claims, exist under which the United States might seek the compensation that Petitioner would deny it under the FCA. Pet. Br. 37-38; *Amicus* Orange Cty. at 12. But Congress determined that such alternatives were inadequate and unreliable, and that is why it enacted the False Claims Act with its treble damages remedy and its *qui tam* provisions. *See supra* pages 26-27. Neither Petitioner nor this Court is empowered to second-guess that legislative judgment. If Petitioner and its *amici* think that the FCA is over-kill, let them make their case to Congress.

CONCLUSION

The federal government disburses hundreds of billions of tax dollars to local governments every year. That level of funding creates enormous opportunity — and enormous temptation — for fraud by cities and counties, and the FCA is the weapon Congress has forged to combat that fraud. The judgment below should therefore be affirmed.

Respectfully submitted,

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Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES ex rel. JANET CHANDLER, Ph.D.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR COUNTY OF DELAWARE, PENNYSLVANIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE COUNTY OF DELAWARE PENNSYLVANIA

The issue before this Honorable Court is whether local governmental entities are immune from liability under the False Claims Act, 31 U.S.C. § 3729 *et seq.* (the "Act"), since the Act is punitive. The same issue was seminal in *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3rd Cir. 2002) ("Dunleavy 2"), in which the Third Circuit ruled that local governments are immune from damages under the Act. Relator in that matter has petitioned this Honorable Court for a writ of certiorari to the Third Circuit based upon that decision, which petition remains pending. Even absent the propinquity because of the *Dunleavy* matter, however, the County of Delaware (the "County") would nonetheless have a significant interest in the matter *sub judice*, as it is a local government entity that receives funds from the federal government under various federal programs and, as such, periodically issues requests for payment and makes reports to federal government agencies that may constitute claims as defined by the Act.

SUMMARY OF ARGUMENT

The County respectfully submits this brief in support of Cook County's argument that because the Act is punitive, local government entities are immune from liability thereunder, as it contains no clear expression of Congressional intent to impose liability thereupon.

a. As demonstrated in the *Dunleavy* case, a relator may maintain a case under the Act in which the federal government declines to intervene, but then resolves the underlying issue with the defendant. Thus, in spite of the fact that the federal government has resolved to its satisfaction the issue giving rise to the alleged false claim by accepting from the grantee what the government considers to be payment in full, the relator may continue to prosecute the action. This is particularly punitive in light of rulings that when determining damages under the Act, the amount of the alleged claim is trebled before any credit is assessed for amounts paid as the result of such a settlement. Since the government is compensated for any harm resulting from the alleged false claim by way of the settlement, any additional damages against the alleged claimant are punitive in nature.

b. Application of the False Claims Act against local governmental agencies is not necessary to protect the federal government from alleged fraud by local governmental entities. Rather, there are many alternative means by which the federal government can protect the public treasury from fraud by local governments that do not include the *in terrorem* threat of punitive damages, including but not limited to, a panoply of common law remedies, audits of grantees under various regulatory previous, and independent audits required under the Single Audit Act (the "Audit Act"). Regulatory audit provisions are generally coupled with a wide array of remedies and sanctions. There has been no showing that fraud by local governments is rampant or that the alternative means for

discovering and remedying any fraud that occurs are ineffective. As alternative means exist which permit discovery and recovery of fraudulently usurped federal funds, the Act, which permits damages up to three times that amount, plus a civil money penalty, is punitive.

ARGUMENT

I. THE FALSE CLAIMS ACT PROVIDES FOR PUNITIVE DAMAGES

There can be no doubt that the treble damages imposed by the Act are punitive. This Court already has so held. *See Vermont Agency of Natural Resources v. United States ex rel.* Stevens, 529 U.S. 765, 784-785 (2000). The holding in *Stevens* was consistent with prior decisions of this Court addressing treble damage provisions. *See, e.g., Texas Industries, Inc. v, Radcliffe Materials, Inc.*, 451 U.S. 630, 639 (1981) (holding that treble damage provision of Clayton Act is punitive). Delaware County's experience demonstrates vividly the punitive nature of the Act.

Under the False Claims Act, "any person who . . . knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim or approved by the Government . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, *plus three times the amount of* damages which the Government sustains because of the act of that person . . . ." 31 U.S.C. § 3729(a) (emphasis added). In *Dunleavy*, the federal government and Delaware County came to a negotiated resolution, allowing the government to get a full recovery of the amount the County errantly usurped. Nonetheless, the Third Circuit ruled that Dunleavy could proceed with his false claims action against the County.

Dunleavy attempted to state a cause of action under the Act in connection with the County's peripheral involvement in the Pennsylvania Department of Transportation's

("PennDOT's") construction of Route 476 around the western perimeter of Philadelphia. In the late 1970's, the County acquired, via condemnation, a 56.6 acre tract of land adjacent to Smedley Park in Nether Providence Township, Pennsylvania (the "Penza Tract"). *U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 736 (3rd Cir. 1997) ("Dunleavy 1"). To acquire the Penza Tract, the County appropriated approximately $1,839,500 in funds it had received under the Community Development Block Grant ("CDBG") program from the United States Department of Housing and Urban Development ("HUD"), and approximately $685,000 of its own funds. *Id.*

The County originally planned to use the Penza Tract to expand Smedley Park. However, on January 26, 1979, it sold 26.3 acres of the Tract to PennDOT for $1,988,550, for the construction of Route 476. *Id.* The County later sold an additional 1.9 acre portion of the Penza Tract to PennDOT for $103,950. *Id.* Because the County retained certain rights to repurchase the properties if the construction of Route 476 was prevented by pending litigation or community opposition, the proceeds of both sales were held by the County in a segregated account. *Id.* In 1988, the County transferred a final portion of the Penza Tract to PennDOT for $1,000,000. *Id.* The litigation blocking construction was resolved and Route 476 was then constructed, opening in 1991. *Id.*

Dunleavy, who was the County's consultant for HUD grant programs during the years in question, (but whose contract was terminated by the County in 1992), filed suit under the Act on November 18, 1994. Dunleavy alleged that the County failed to report the proceeds from sales of the portions of the Penza Tract to HUD as program income, and to use the proceeds for CDBG purposes allegedly as required by the contractual agreement and grant program through which the funds were acquired from HUD. *Id.* at 137.

HUD made an independent investigation of the Penza Tract Fund in 1996. *Id.* As a result, it demanded repayment of approximately $1,900,000 by the County. *Id.* After

negotiation, and over Dunleavy's protest, HUD settled the matter with the County for $1,921,699. *Id.* HUD then returned the money to the County's line-of-credit, making it available for eligible uses. *Id.*

In spite of the settlement between the County and HUD, and although it was not an issue raised on appeal by the parties, the Third Circuit held that the relator could proceed with his False Claims action against the County. *Id.* at 739. After discussing whether the federal government intended its settlement with the County to satisfy the underlying claim or to address an entirely separate transgression, the Third Circuit went on to state as follows:

> we need not decide whether the settlement terminated the government's rights against Delaware County under the Act, because Dunleavy's right to proceed with his *qui tam* action remains unimpaired. Subsection (c)(5) preserves a relator's right to a percentage of the recovery even when the government chooses to pursue its claim administratively. Because the government never exercised its rights to intervene, the settlement between HUD and Delaware County does not negate Dunleavy's ability, as the relator, to proceed independently with his *qui tam* action.

Id.[1] Thus, in spite of the federal government's recovery of its loss, and its satisfaction with that recovery, the Third Circuit's decision allows the relator to continue to prosecute his action under the Act, and to obtain damages as provided therein.

The method in which damages are calculated in the face of a credit there against being due to the defendant emphasizes the punitive nature of the Act. The issue of how to apply credits against false claims damages was addressed by the Court in *U.S. v. Bornstein*, 423 U.S. 303 (1976). In that case, a subcontractor shipped falsely labeled electron tubes to the prime contractor that did not meet the specifications for the project in question. *Id.* at 307. The prime contractor then incorporated the tubes into radios produced for the federal government, and requested payment as though it employed the proper tubes. *See Id.*

After the fraud was discovered, the federal government recovered a portion of the costs of the radios from the prime contractor. *Id.* The government then brought suit under the Act against the subcontractor. *Id.* at 308. One issue in that suit was whether the credit against the government's damages resulting from its recovery from the prime

1. "Subsection (c)(5)" refers to 31 U.S.C. 3730(c)(5), which reads as follows:

> [N]otwithstanding subsection (b), the Government may elect to pursue its claim through any alternative remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

contractor should be applied before or after the damages were doubled.[2] The Court concluded that the purpose of the Act was best served if the damages were doubled before the credit was applied for several reasons. *Id.* at 311-12. First, double damages were necessary to completely compensate the Government for the costs, delays and inconvenience caused by the fraudulent claims. *Id.* at 312. That statement rang particularly true under the version of the Act then in existence, as the relator was at that time entitled to up to fifty percent (50%) of the recovery; now, with treble damages, and the Relator entitled to no more than thirty percent (30%) of the proceeds, that rationale no longer applies. Second, the Court feared that fixing damages against a defendant based upon the actions of a third party would cause disparate results across cases. *Id.* For example, one subcontractor should not be entitled to a windfall as compared to another simply because the first prime contractor was willing to compensate the government for its loss and the second prime contractor was not. *Id.* Finally, the Court did not want to provide a defendant with a way to avoid double damages by simply tendering the amount of actual damage before judgment. *Id.*

Courts have applied *Bornstein* mechanically, in spite of the increase in the False Claims multiplier as a result of the 1986 amendment to the Act. *See e.g., U.S. v. Cabrera-Diaz*, 106 F. Supp. 2d 234, 241 (D.P.R. 2000); *BMY-Combat Sys. Div. of Harsco Corp. v. U.S.*, 44 Fed. Cl. 141, 150 (1999); *U.S. v. Entin*, 750 F. Supp. 512, 519-20 (S.D. Fla. 1990); *U.S. v. Pani*, 717 F. Supp. 1013, 1017, 1019 (S.D.N.Y. 1989). This Court has recognized that the increase from double to treble damages rendered invalid this Court's prior suggestion in *Bornstein* that the Act was compensatory, and has declared the treble damage provision of the Act to thus be punitive rather than compensatory in nature. *See Vermont Agency of Natural Resources v. U.S.*, 529 U.S. at 785-86. The trebling

2. Prior to the 1986 amendment, the Act provided for double, rather than treble damages. *See* 31 U.S.C. § 3729(a).

of damages in the original amount in spite of a settlement between the government and the claimant, provides further evidence of the Act's punitive nature.

Moreover, the Court's concern in *Bornstein* that a guilty defendant could avoid liability simply by tendering an amount prior to trial is not applicable to *Dunleavy*. In the case of Delaware County, the United States conducted an audit and determined the amount it believed was owed by the County. After further communication, the United States and the County determined the amount which they respectively agreed would make the government whole, and the government accepted that payment in full satisfaction of its audit findings. The concern raised in *Bornstein* ignored the fact that a settlement would not be effective unless the government exercised its discretion to accept payment from the defendant in resolution of the issue. Unlike the defendant in *Bornstein*, the County was not receiving the benefit of a payment made by a third party. Allowing the relator to proceed for treble damages when the Government already has accepted and received what it considers itself to be due, only highlights and exacerbates the punitive nature of the Act.

II. THE FALSE CLAIMS ACT IS PUNITIVE IN NATURE BECAUSE THE UNITED STATES HAS ALTERNATIVE MEANS TO DETECT AND RECOUP LOSSES.

The Act does not provide the exclusive, or even a necessary, means for the federal government to recoup losses incurred because of allegedly fraudulent claims by municipal entities. There has been no showing that fraud by local governmental entities is rampant or that alternative means of discovering such alleged fraud are insufficient or ineffective. Indeed, although the Act was passed in 1863, there were no reported decisions attempting to impose liability on local governmental entities until the decision in *United States ex rel. Graber v. City of New York*, 8 F. Supp.

2d 343 (S.D.N.Y. 1998). Although *Dunleavy* and other cases were filed in the mid-1990's, the County is not aware of any False Claims Act cases being filed against local governmental agencies substantially before that time. Moreover, the number of cases alleging local governmental false claims is miniscule compared with the overall number of False Claims Act cases filed and in light of the billions of dollars disbursed by the federal government to thousands of municipalities and other local governments annually.

As the Court has stated, the Act "was enacted in 1863 with the principal goal of stopping the massive frauds perpetrated by large [private] contractors during the Civil War." *Stevens*, 529 U.S. at 781, *citing*, *United States v. Bornstein*, 423 U.S. at 309. However, when addressing the ability of the federal government to detect fraud in grant programs by local governments, it is important to note that in addition to the other investigative tools available to the federal government for all grantees, local governments are also subject to an additional layer of scrutiny that does not apply in the governmental contractor context. All state governments, local governments and non-profit organizations ("Non-federal Entities") that receive $300,000 in awards from the federal government in a fiscal year are also subject to the Audit Act. *See generally* 31 U.S.C. §§ 7501-7507. Pursuant to the Audit Act, each such entity must undergo either a single audit, as set forth in the Audit Act, or a program specific audit, each fiscal year. 31 U.S.C. § 7502(a)(1)(A).[3] Auditors are required to report the results of audits made pursuant to the Audit Act, and any federal agency which provides an award to a Non-federal Entity is required to review that entity's audit. 31 U.S.C. § 7502(f)(1)(B), (g)(1). The reports generated by the auditors are submitted to a clearinghouse and made available to the

3. Non-federal entities that receive awards under multiple programs must undergo a single audit. 31 U.S.C. § 7502(a)(1)(B). Non-federal entities that receive awards under a single program may elect either a program-specific audit or a single audit.

public. 31 U.S.C. § 7502(h). The Director of the Office of Management and Budget and the clearinghouse are also responsible for reviewing audits submitted by Non-federal Entities that receive awards from multiple federal agencies. *See* 31 U.S.C. § 7504(b).

In those instances where there may be fraudulent or false claims, common law remedies are available to the federal government to recover usurped amounts. The most obvious action would be for breach of contract resulting from the grantee's failure to abide by the terms of the grant agreement. Actions for fraud or unjust enrichment, among others, also would be available to the federal government, depending upon the specific facts, or other contract (such as the Annual Contributions Contract between HUD and each public housing authority) governing the receipt, use of and reporting for federal grants.

In addition to the common law remedies, there is an entire regulatory scheme that has been established to govern the policing of federal grants to grantees. The Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1-12 (2002) (the "IGA") and the regulations of the various executive departments and agencies, each provide sufficient means for the discovery and recovery of funds fraudulently usurped from the government. The discrepancy between the amount recoverable via the Act and that recoverable via the IGA and the various administrative audit provisions further evidences the punitive intent of the Act.

In enacting the IGA, Congress stated that among the purposes of the Offices of Inspector General is prevention and detection of fraud and abuse in the programs and operations of the various executive agencies. *See* 5 U.S.C. App. 3 § 2(2) (2002). The Inspectors General are to conduct audits and reviews to prevent fraud in federal programs. *See* 5 U.S.C. App. 3 § 2(1) (2002). To the extent any program regulations are insufficient for the discovery and prevention of fraud, the Inspectors General have a duty to inform the heads of their respective agencies and Congress, and to

make recommendations for corrections. *See* 5 U.S.C. App. 3 §§ 2(3), 4(a)(5) (2002). The legislative history of the IGA recognizes the effective role Inspectors General and similar auditors have played in uncovering grantee problems and makes it clear that Congress desired that the position created thereunder be charged with discovery and recovery of grantee fraud:

> In testimony supporting H.R. 8588 and an appropriate balance between audit and investigative responsibilities, the General Accounting Office endorsed each of the auditing provisions proposed by the committee, and recommended that the title of Inspector General be amplified to reflect the importance of the audit function. The Comptroller General testified that 'the name of the organizations established by the bill will set the tone for how they operate,' and suggested a title such as inspector and auditor general. The GAO also stated its finding that 'internal auditors nearly always pay their own way many times over by performing audit work that leads to: recovery of overpayments from grantees and contractors, adoption of more efficient and economical ways of conducting agency operations, and tightening of controls over cash and other assets to make fraud and abuse more difficult.' The irony of inadequate attention to proper auditing by many program officials is underscored by GAO's estimate that audit-related savings run into many billions even though agencies do not always take full advantage of internal auditors' work.

Act of October 12, 1978, Pub. L. No. 95-452, 1978 U.S.C.C.A.N. (92 Stat. 1101) 2676, 2685-86.

Agencies that are susceptible to False Claims also have promulgated audit and reporting regulations that provide sufficient means to discover and prevent fraud in their respective programs. As stated above, in the *Dunleavy* matter HUD actually exercised its audit prerogative, and as a result was able to obtain a $1,921,699 settlement with the

County. Among the provisions available to HUD to audit and recover funds dispersed under the Community Block Development Grant program are 24 C.F.R. § 85.42 (requiring grant recipients to provide access to records to the Comptroller General and HUD representatives), §§ 570.900-.906 (requiring HUD to conduct reviews of grantee performance on an annual or more frequent basis) and §§ 570.910-.913 (governing the sanctions available to HUD to remedy grantee non-compliance).

A survey of some of the cases filed against local governments under the False Claims Act shows that for each program under which false claims were allegedly made, federal regulations similarly provide adequate provisions for the detection and recovery of fraudulently usurped funds, which regulatory audits and investigations would have been available to the government had it chosen to utilize these methods in those cases.

In the matter *sub judice*, Relator attempts to state a cause of action under the Act for fraud in connection with a grant from the National Institute of Drug Abuse ("NIDA"). *See U.S. ex rel Chandler v. Hektoen Institute for Med. Res.*, 35 F. Supp. 2d 1078, 1079-80 (N.D. Ill. 1999) ("Chandler 1"). Part 92 of Title 45 of the C.F.R. sets forth uniform administrative requirements for HHS grants to local governments. *See* 45 C.F.R. § 92.1.

Cook County and Cook County Memorial Hospital, the latter of which was the recipient of the NIDA grant, are local governments as defined under Part 92. *See* 45 C.F.R. § 92.3. *See also Chandler 1* at 1086 (stating that Cook County Hospital does not have a separate legal existence from Cook County). The regulations in Sections 92.40 through 92.44 set forth a series of reporting requirements imposed upon local government grantees, including but not limited to, annual (and, in some instances, quarterly) performance reports and periodic financial statements, whose frequency is to be determined by HHS depending on the program. *See, e.g.*, 45 C.F.R. § 92.40, § 92.41. Section 92.42 requires

grantees to retain records and provide access to same to HHS and the Comptroller General. *See* 45 C.F.R. § 92.42. Finally, section 92.43 sets forth remedies to the federal government if a grantee fails to comply with any term of an award. *See* 45 C.F.R. § 92.43. Those remedies include withholding payment to a grantee, disallowing credit for the cost of a non-complying activity, terminating the grantee's award, withholding further awards, suspension and debarment from participation in federal programs, and any other remedies available at law. *Id.*

U.S. v. Hickman County arose from the federal government's allegation that Hickman County received disaster funds under the 42 U.S.C. § 5121, et seq. (the "Stafford Act"), to repair flood damaged bridges from the Federal Emergency Management Agency, but did not spend the funds on any of the bridges for which relief was sought. *U.S. v. Hickman County*, no. 1:97-0086 at 3 (M.D. Tenn. March 29, 2001). Hickman County was declared a disaster area by President Clinton. *Id.*

Pursuant to 44 C.F.R. § 206.16(a)[4], the Associate Director or Regional Director of FEMA:

> shall conduct audits and investigations as necessary to assure compliance with the Stafford Act, and in connection therewith may question such persons as may be necessary to carry out such audits and investigations.

Under section 206.16(b), auditors may also access books and records of any person relating to any activity undertaken or funded pursuant to the Stafford Act. 44 C.F.R. § 206.16(b). Section 206.14 provides for a fine for misuse of Stafford Act funds equal to one and one-half times the misapplied amount, plus a civil penalty of up to $5,000 for each violation of the Stafford Act. *See* 44 C.F.R. § 206.14( ) and

4. Title 44, Part 206, subpart A of the Code of Federal Regulations governs grants made pursuant to a declaration by the President of a major disaster or emergency. *See* 44 C.F.R. § 206.1.

(d). That section also preserves the federal government's right to initiate a civil action for violations of the Stafford Act. *See* 44 C.F.R. § 206.14(b).

In *U.S. ex rel. Kinney v. Hennepin County Med. Cent.*, 2001 WL 930780 (D. Minn. Jan. 22, 2001) the relator alleged that the medical center submitted false statements seeking reimbursement related to ambulance transportation from Medicare and Medicaid. *Id.* at *1. Similarly, in *U.S. ex rel. King v. Jackson County Hospital Corporation*, 2001 U.S. Dist. Lexis 21706, the relator alleged that defendants submitted or conspired to submit false Medicare and Medicaid claims, submitted duplicate claims and altered claim documents. *Id.* at 4.

Title 42 of the C.F.R. sets forth several provisions for the detection of such alleged violations of the Medicare and Medicaid programs. *See* 42 C.F.R. § 1004.30 (requiring that Peer Review Organizations report violators to the HHS Office of Inspector General). *See* also 42 C.F.R. § 447.202 (requiring state Medicaid agencies to assure appropriate audits of provider records for payments based on costs of services or fee plus cost of materials bases). Additionally, Parts 1003 and 402 provide for civil money penalties, assessments and exclusions from federal programs for violations of the Medicaid and Medicare provisions of the Social Security Act. *See* 42 C.F.R. §§ 402.1, et seq., 1003.100, et seq.

In *U.S. ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998), relator alleged that the City submitted false statements to obtain federal incentive funding and reimbursement for foster care expenditures. *Id.* at 344. As set forth above, Part 92 of Title 45 of the C.F.R. sets forth uniform administrative requirements for HHS grants to local governments. *See* 45 C.F.R. § 92.1. Foster care reimbursement is made through grants, in this case grants to the City. *See* 42 U.S.C. § 670, et seq. Therefore, the same requirements and remedies described in the above discussion of the matter *sub judice* are applicable in the New York City matter as well.

In *U.S. ex rel. Honeywell v. San Francisco Housing Authority*, 2001 WL 793300 (N.D. Cal. July 12, 2001), arose out of a contract dispute between Honeywell, Inc. ("Honeywell") and the San Francisco Housing Authority ("SFHA"). *Id.* at *1. SFHA received funds from HUD for utility consumption. *Id.* To encourage energy conservation, SFHA and other public housing authorities ("PHAs") were permitted to freeze their consumption funding for a period of time. *Id.* Under HUD regulations, PHAs were permitted to retain fifty percent (50%) of the savings achieved through energy saving improvements, and were required to remit the remainder to the contractor making the improvements. *Id.*

PHA grantees are subject to both energy and financial audits. Energy audits must be completed at least once every five years, and must list all conservation measures and indicate the payback period for such measures. 24 C.F.R. § 965.302. 24 C.F.R. § 85.26. Grantees are required to retain records for a period of at least three years for the purpose of audits and litigation. 24 C.F.R. § 85.42. The regulations set forth remedies for failure to comply with the terms of an award, statute or regulation which include: withhold of cash payments pending remedy of a violation; disallowance of a non-complying activity; suspension or termination from the program; withholding of future awards from the program; debarment or suspension; or any other remedy available at law. 24 C.F.R. § 85.43.

As each of the above cases illustrates, administrative regulations provide federal agencies with the ability to audit grantees and recover any improperly usurped funds. However, none of the remedies set forth in such regulations are as drastic as the treble damage provisions of the Act. Because the administrative agencies have deemed the regulatory provisions to be sufficient means to recoup losses of program funds, more drastic False Claim remedies extend

beyond mere compensation and are punitive. While punitive sanctions against private entities may be permissible, the longstanding precedents of this Court prohibit such sanctions against local governmental entities absent the express intent of Congress to the contrary. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-263 (1981).

CONCLUSION

The treble damage provision of the Act, coupled with the availability to federal entities of less harsh remedies, provide clear evidence of the Act's punitive intent. Relators are permitted to proceed with *qui tam* actions in spite of settlement of the underlying dispute between the federal government and the defendant. The punitive effect of the Act is emphasized by the fact that damages under the Act are trebled before any credit for such a settlement is calculated.

Moreover, subjecting local government entities to False Claims Act liability, in addition to contravening the common law immunity against punitive damages, is not necessary to enable the United States to discover and rectify false claims by local governmental agencies. Rather, there are well developed statutory, regulatory and common law remedies available to insure that the government has the means to protect the federal treasury from any alleged false claims by local governmental entities.

Respectfully submitted,

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No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, PH.D.,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

AMICUS CURIAE BRIEF OF 43 LOCAL GOVERNMENTAL AIRPORT PROPRIETORS IN SUPPORT OF PETITIONER.

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Dated: September 9, 2002

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INTEREST OF AMICI CURIAE

Forty-three local governmental entities from across the United States that own or operate public airports have joined to file this brief as *amici curiae*.[1] These entities represent a wide variety of forms of local government that all will be affected by the Court's decision in this case. Twenty-six are cities or counties (or departments of city or county government) that own or operate public airports;[2] thirteen are special purpose local airport authorities;[3] and four are transportation

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[1] Letters of consent for the filing of this brief as *amici curiae* have been submitted to the Clerk in accordance with Rule 37.3 of the Rules of this Court. This brief was not authored in whole or in part by counsel for either party, and no person or entity other than the 43 *amici curiae* listed in footnotes 2-4 *infra* made a monetary contribution to the preparation or submission of this brief.

[2] The City of Albuquerque, New Mexico, City of Amarillo, Texas, City of Austin, Texas, City of Bangor, Maine, City of Billings, Montana, City of Boise, Idaho, City of Burlington, Vermont, City of Charlotte, North Carolina, City of Cleveland, Ohio, City of Colorado Springs, Colorado, Cities of Dallas and Fort Worth, Texas, City of Dayton, Ohio, City and County of Denver, Colorado, City of Des Moines, Iowa, City of Houston, Texas, City of Kansas City, Missouri, City of Oklahoma City, Oklahoma, City of Philadelphia, Pennsylvania, City of St. Louis, Missouri, City of Salt Lake City, Utah, City of Tulsa, Oklahoma, Town of Islip, New York, Kent County, Michigan, Monroe County, New York, Wayne County, Michigan and Westchester County, New York.

[3] The Albany County Airport Authority, Allegheny County Airport Authority, Bishop International Airport Authority, City of Fargo Municipal Airport Authority, Columbus Airport Authority, Fort Wayne/Allen County Airport Authority, Indianapolis Airport Authority, Kenton County Airport Board, Memphis Shelby County Airport Authority, Metropolitan Washington Airports Authority, Regional Airport Authority of Louisville and Jefferson County, (continued...)

authorities created under state law (or interstate compact) to own and operate public airports.[4] Collectively, the *amici* own or operate many of the nation's largest public airports, serving hundreds of millions of passengers each year.

The resolution of the question pending before this Court – whether *any* local governmental entity is a "person" subject to *qui tam* liability under § 3729(a) of the False Claims Act – potentially will dispose of an action pending in the Northern District of Ohio in which all of these entities have been named as defendants. The relator in that action, captioned *United States ex rel. Pram Nguyen* v. *City of Cleveland, Ohio, et al.* (No. 1:00 CV 208), has alleged in his *qui tam* complaint that each of these governmental entities has made false assurances to the Federal Aviation Administration ("FAA") about compliance with federal environmental laws in order to obtain billions of dollars in grants under the federal airport improvement program ("AIP"). The Department of Justice has declined to intervene. The 43 entities that submit this brief jointly have moved to dismiss the action on a number of grounds, including most prominently that they

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(continued...)

Rickenbacker Port Authority, and Toledo-Lucas County Port Authority.

[4] The Port Authority of New York and New Jersey, Niagara Frontier Transportation Authority, Massachusetts Port Authority, and the Minneapolis-St. Paul Metropolitan Airports Commission.

are immune from suit under § 3729(a) of the False Claims Act because they are not "persons" subject to *qui tam* liability. They have also moved to dismiss on the basis of misjoinder and lack of particularity.[5]

The outcome of Cook County's appeal is of vital interest to the millions of constituents of the 43 local governmental entities that submit this brief. Across the country, these public airport proprietors currently are undertaking, or are planning to undertake, massive airport capital improvement projects and, in the wake of the events of September 11, 2001, to institute new security programs. If they are required to pay a punitive, treble damages judgment in the *Nguyen* action that could run into the billions of dollars, they would be forced to reduce, or even eliminate, the financing of these essential public infrastructure projects. Moreover, to cover the costs of such a massive judgment, they would be forced to turn to innocent travelers and taxpayers to foot the bill. These airport proprietors would have no choice but to reduce existing airport services, increase airport charges affecting the airlines and their passengers, and in many cases, increase the tax burden on the public at large.

Further, an adverse decision in this case could unjustly destroy the benefits that the traveling public and the federal government, as well as the *amici*, have reaped from the AIP. The

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[5] The motion to dismiss has been pending in the Northern District of Ohio since March 15, 2002.

amici have used all of the billions of AIP grant dollars they have received precisely as the FAA intended: they have built and improved their airport infrastructure to serve the traveling public. The relator has made no allegation that any of the 43 *amici* have misspent even a single cent of the billions of dollars they have received in AIP grants.[6]

On behalf of their blameless constituents, this diverse group of local governmental organizations urges the Court to reverse the decision of the Seventh Circuit, and hold that *all* forms of local government are immune from liability under § 3729(a).

SUMMARY OF ARGUMENT

In its decision below, the Seventh Circuit held that local governmental entities such as Cook County, Illinois, are "persons" subject to punitive damages in *qui tam* actions brought under § 3729(a) of the False Claims Act. Because that decision runs contrary to established Supreme Court precedent, the purpose of the False Claims Act and sound public policy, this Court should reverse the decision by the Court of Appeals.

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[6] The relator, Pram Nguyen, has never sought to trigger any enforcement action by the FAA, which has broad powers to investigate and prosecute any violations of AIP grant assurances. *See* 14 C.F.R. Parts 13, 16 (2002).

Section 3729(a) of the False Claims Act subjects to treble damages any "person" who submits a false claim to the federal government, but it does not define what it means by "person." In the absence of such a definition, if the Court has any doubt whether the term "person" includes local governmental entities, it should resort to the application of longstanding presumptions governing the interpretation of federal statutes.

This Court has held that absent express Congressional intent, local governmental entities cannot be subjected to punitive damages under a federal statute. This Court also recently held that the mandatory treble damages provided by § 3729(a) are punitive damages. Accordingly, local governments cannot be subjected to liability under the Act absent clear evidence that Congress intended such a result.

There is no evidence that Congress intended to subject any type of local governmental entity to punitive damages under the False Claims Act. When it inserted the mandatory treble damages provision in 1986, Congress was aware that the mandatory treble damages would be treated as punitive damages and, consequently, that local governmental defendants presumptively would be immune from suit. However, Congress did not define "person" in 1986 to include any form of governmental defendants or otherwise express Congressional intent to subject local governmental entities to punitive damages.

A countervailing interpretive presumption relied on by the Seventh Circuit in its decision below – that the word "person" in a federal statute includes local governments – must yield to the longstanding presumption of local governmental immunity from punitive damages.

Finally, public policy dictates that local governmental entities are not "persons" subject to liability under the False Claims Act. Neither of the traditional functions of punitive damages – retribution or deterrence – would be served by imposing treble damages against governmental entities. Indeed, innocent citizens typically will bear the burden of a treble damages judgment against a local governmental entity because the entity will have no choice but to pass along the cost of the judgment to blameless citizens in the form of reduced or more expensive public services, or higher taxes.

ARGUMENT

There is no doubt that since 1986, the False Claims Act has imposed mandatory punitive damages upon any "person" found to be liable in a *qui tam* action under 31 U.S.C. § 3729(a). *See Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000) (the Act now "imposes damages that are essentially punitive in nature"); *see also United States ex rel. Dunleavy* v. *County of Delaware*, 279 F.3d 219, 223 (3d Cir. 2002); *United States ex rel. Chandler* v. *Cook County*, 277 F.3d 969, 977 (7th Cir. 2002); *United States ex rel. Garibaldi* v. *Orleans Parish Sch. Bd.*, 244 F.3d 486, 491 n.5 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808 (2002).

The False Claims Act has never provided a definition of "person" as that term is used in § 3729(a). *See Stevens*, 529 U.S. at 782-783 and n.12. The petitioner, Cook County, properly has observed that, despite the absence of such a definition, the plain language of the False Claims Act, read in context, reveals that the term "person" in the liability provisions of the Act has never included local government. *Brief of Petitioner*, Section I.A. However, if the Court were to determine that the plain language of the statute does not resolve whether local governments are subject to liability under § 3729(a), it then should assess whether any common law interpretive presumptions may aid the Court in interpreting the term "person" as it is used in the current iteration of the statute. *See Stevens*, 529 U.S. at 780 (recognizing that, in the absence of a specific definition of "person" in the statute, it was required to "apply . . . our longstanding interpretive presumption that 'person' does not include the sovereign" to determine whether States are "persons" subject to liability).

I. LOCAL GOVERNMENTS ARE NOT "PERSONS" UNDER § 3729(a) BECAUSE CONGRESS HAS NOT *EXPRESSLY* SUBJECTED THEM TO PUNITIVE DAMAGES.

A. Local Governmental Entities Are Immune From Punitive Damages Absent A Clear Statement Of Congressional Intent.

When Congress amended the False Claims Act in 1986 to provide for mandatory punitive damages, it implicated the common law presumption that punitive damages may not be imposed against local governmental entities. *See Stevens*, 529 U.S. at 784-785, citing *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 262-263 (1981)(holding that the imposition of the Act's mandatory punitive damages against state governments "would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities"). In *Newport*, the Court addressed whether a city could be held liable for punitive damages under 42 U.S.C. § 1983. It held that local governmental entities are immune from punitive damages under a federal statute, so long as (1) Congress has not expressed clearly in the statute its intent to subject local governments to liability for such damages, and (2) the exemption from liability comports with public policy. *Newport*, 453 U.S. at 263-266; *see also Barnes* v. *Gorman*, 122 S. Ct. 2097, 2103 (2002)(recognizing the "traditional presumption against imposition of punitive damages on government entities" under federal statutes). "Damages awarded for punitive

purposes . . . are not sensibly assessed against [a] governmental entity itself," the *Newport* Court reasoned, because the imposition of such damages punishes only citizens who took no part in the commission of the tort. *Newport*, 453 U.S. at 267. Therefore, consistent with *Newport*, local governmental entities such as Cook County and the *amici* are not "persons" subject to the False Claims Act's mandatory punitive damages absent a clear expression of Congressional intent to the contrary.

B. The Presumption Of Local Governmental Immunity Is Not Limited To § 1983 Cases.

In its decision below, the Seventh Circuit suggested, incorrectly, that the presumption of governmental immunity from punitive damages does not attach to local governments under the False Claims Act because, in that court's view, there are important differences between the § 1983 damages regime at issue in *Newport* and the damages provision of § 3729(a). *Chandler*, 277 F.3d at 978. The panel asserted the untenable position that it is appropriate for citizens to bear some of the burden of False Claims Act damages imposed on local governments because, in contrast to a § 1983 case, the local government's constituents have benefited from the ill-gotten gains. *Id.* The panel also determined, without any basis, that the burden shifted to taxpayers will be less onerous under the False Claims Act than under § 1983 because the local government can satisfy a portion of the judgment with the monies it fraudulently obtained. *Id.* Finally, the panel

mistakenly contended that the injury to the public is minimized under the False Claims Act because that statute caps a judge's discretion by limiting damages to three times the federal government's loss, while § 1983 affords a jury unlimited discretion to determine the size of a punitive damages award. *Id.* Because the Seventh Circuit's distinctions between the False Claims Act and § 1983 are illusory, and because its factual assertions are incorrect, its reasoning should be rejected as inconsistent with this Court's decisions in *Newport* and *Stevens*.

Newport stands for the broad proposition that local governmental entities are immune from punitive damages under federal statutes absent specific Congressional direction to the contrary, because the entities' constituents inevitably would be punished for the wrongdoing of others if punitive damages were imposed. 453 U.S. at 267. The Court pointedly noted that punitive damages imposed on a municipality are "in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* Even if a local governmental entity properly could be asked to repay what it fraudulently received from the United States, on the theory that its constituents should not benefit from wrongful conduct, the imposition of the mandatory *treble* damages under the False Claims Act inevitably would punish taxpayers and other beneficiaries of civic resources far beyond any benefit those citizens received as a result of the local government's fraud.

Moreover, in many instances, the limitation of a judgment against a local government to treble damages will barely ease the burden inevitably to be borne by the government's constituents. For example, in the *qui tam* case pending in the Northern District of Ohio against the 43 local governmental entities that have submitted this *amicus* brief, the relator has claimed that each of the defendants defrauded the federal government out of millions of dollars when they accepted federal airport improvement grants and certified their compliance with federal environmental laws. A judgment for the relator in that case – which could run into the *billions* of dollars, even before trebling, without any suggestion that the federal government believes there has been any misconduct or wants its grant money back – would result in a massive windfall for the relator at the expense of the traveling public and innocent taxpayers, who would be forced to bear the burden of punitive damages. It is unlikely that even an exceedingly generous jury would, or lawfully could, award greater damages against municipal defendants in any § 1983 action.

II. CONGRESS WAS AWARE OF THE PRESUMPTION OF GOVERNMENTAL IMMUNITY IN 1986, BUT DID NOT DEFINE "PERSON" TO INCLUDE LOCAL GOVERNMENTS.

Whenever Congress enacts a statute, it reasonably expects that the new law will be interpreted in accordance with the Supreme Court's existing jurisprudence. *United States v. Wells*, 519 U.S. 482, 495 (1997). Before Congress amended the False Claims Act in 1986 to

mandate treble damages, the Court repeatedly and unequivocally had recognized that treble damages are inherently punitive. *Stevens*, 529 U.S. at 785-786, citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). *See also American Soc'y of Mech. Eng'rs Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982). The Court therefore may presume that when Congress provided for mandatory treble damages under § 3729(a) in 1986, it recognized that the statute would be enforced as a punitive damages regime.

The Court also may presume that, in light of its 1981 *Newport* decision, Congress was aware when it inserted the punitive damages provision in § 3729(a) that the common law would operate to immunize all local governmental entities from liability under that section unless Congress explicitly said otherwise. Congress nevertheless chose not to include a definition of "person" in § 3729(a), let alone define it to include local governmental entities. The inception of a punitive damages regime in the absence of a definition of "person" that includes governmental entities thus is itself "powerful evidence" that Congress did not intend to subject local governmental entities to punitive damages under § 3729(a). *Dunleavy*, 279 F.3d at 224.

The fact that Congress explicitly has subjected local governmental entities to liability under a number of other federal statutes that impose punitive damages also supports the conclusion that Congress, through its silence, has exempted local governmental entities from the mandatory treble damages of § 3729(a). For example, in the Clean Water Act ("CWA") and the

Resource Conservation and Recovery Act ("RCRA") Congress expressly defined the universe of "persons" subject to their penalties and damages to include local governmental entities. *See* 33 U.S.C. § 1362(5) (defining "person" subject to punitive damages under the CWA to include municipalities and subdivisions of a State); 42 U.S.C. § 6903(15) (defining "person" subject to RCRA damages to include municipalities and subdivisions of a State). That is why an award of punitive damages against municipalities is permitted under both the CWA and RCRA, despite the presumption of governmental immunity articulated in *Newport*.

III. THE INTERPRETIVE PRESUMPTION THAT LOCAL GOVERNMENTS ARE "PERSONS" DOES NOT APPLY TO § 3729(a).

To support its holding that local governmental entities such as Cook County presumptively are "persons" subject to suit under § 3729(a), the Seventh Circuit erroneously relied on the interpretive presumption, articulated in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), that the term "person" in a federal statute applies to local governmental entities. *Chandler*, 279 F.3d at 980. In *Monell*, the Court determined that local governments are "persons" within the meaning of 42 U.S.C. § 1983, and therefore subject to liability for compensatory damages under that statute. In support of its holding, the Court relied on extensive evidence in the legislative history of the Civil Rights Act of 1871 – the precursor of § 1983 – that Congress intended local governments to be subject to that

statute's requirements. 436 U.S. at 665-690. The Court also relied in part on the interpretive presumption, established in the Dictionary Act of 1871 (just months before the enactment of the Civil Rights Act of 1871), that the word "person" in a statute presumptively applies to "bodies politic and corporate," including local governments. *Id.* at 688-689. The Seventh Circuit's reliance on *Monell* to subject Cook County to liability under the False Claims Act is completely misplaced.

The narrow holding in *Monell* – that a municipal corporation is a "person" for purposes of 42 U.S.C. § 1983 – is premised in part "on specific indications in the legislative history of § 1983" that Congress intended that particular statute to reach governmental entities. *Garibaldi*, 244 F.3d at 494. Unlike the False Claims Act, § 1983 focuses liability on *public* defendants – those who act "under the color of state law." *Id.*, citing *Monell*, 436 U.S. at 685-686. There are no indications whatsoever in the legislative history of the False Claims Act, however, that Congress intended to punish fraud by state or local governmental entities. *Stevens*, 529 U.S. at 781. Further, the pertinent provision of The Dictionary Act undergirding the *Monell* decision provides that the term "person" may extend and be applied to local governmental entities "*unless the context shows that ['person'] [was] intended to be used in a more limited sense.*" *Monell*, 436 U.S. at 687-688, citing Act of Feb. 25, 1871, § 2, 16 Stat. 431 (emphasis supplied). In the case of the False Claims Act, the context shows *precisely* that: the legislative history of the Act reveals that it was

enacted "with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War,'" not to penalize local governments. *Stevens*, 529 U.S. at 781, quoting *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976).

As Cook County's brief elaborates, the presumption that the term "person" includes local government was not recognized until 1869, six years *after* the original enactment of the False Claims Act. *Brief of Petitioner*, Section I.A.2. However, even if the Court were to assume that the term "person" in the liability provision of the Act extended to local governmental entities from the inception of the Act in 1863 until 1986, the term "person" cannot be read to extend that far after the 1986 amendments made awards of punitive damages mandatory.

The Court made clear in *Newport*, a case decided three years *after Monell*, that the presumption that a municipality is a "person" does not apply when a statute imposes punitive damages. *See* 453 U.S. at 271. It is precisely for that reason that, in spite of *Monell*, the Court found in *Newport* that municipal defendants are not subject to punitive damages in § 1983 cases. *Id.* Congress was well aware of the *Newport* decision by 1986, yet did not take any affirmative steps to abrogate local governmental immunity from punitive damages under § 3729(a). Consequently, local governmental entities cannot properly be found liable for treble damages under the Act. Because the Act's punitive damages are mandatory, it follows that local governmental

entities are not "persons" within the meaning of § 3729(a).

IV. EXPOSING *ANY* LOCAL GOVERNMENTAL ENTITY TO PUNITIVE DAMAGES UNJUSTLY WOULD PUNISH INNOCENT CITIZENS.

This Court recognized in *Newport* that the imposition of punitive damages against a governmental entity is only proper if imposing them would be consistent with sound public policy. *See* 453 U.S. at 258-259. Subjecting cities, counties and various other local governmental entities around the country, such as the 43 that have joined this brief, to massive punitive damages under the False Claims Act, however, would contravene both of the public policies underlying awards of punitive damages: the punishment of wrongdoers, and the deterrence of future misconduct. *Id.* at 266-267.

If the relator and the federal government were permitted to recover three times the total of all the airport improvement program grants received by the scores of governmental airport proprietors that have been sued in the *qui tam* action pending in the Northern District of Ohio, hundreds of millions of innocent travelers and taxpayers, but not a single alleged government wrongdoer, would be punished. Even if the local governmental entities could pay the federal government's *actual* damages out of the monies they allegedly obtained unlawfully – a dubious proposition, to be sure, given that they have already spent those funds exactly as the FAA wished – citizens with no knowledge of or control

over the submission of the allegedly fraudulent grant assurances inevitably would be saddled with the remaining *punitive* damages.

The governmental airport proprietors with taxing authority would have no choice but to levy taxes to pay for the windfall going to the relator and the federal government (which has never sought to recover any of the grant awards). Moreover, the local governmental defendants likely would be forced to increase fees for the use of airport facilities or to reduce services to the traveling public, to cover the cost of the judgment. *See Newport*, 453 U.S. at 267; *see also Shifa Servs., Inc.* v. *Port Auth. of N.Y. and N.J.*, 1997 U.S. Dist. LEXIS 13611 at *15 (S.D.N.Y Sept. 5, 1997)(holding the Port Authority to be immune from punitive damages under § 1983 because "an award of punitive damages might result in increased tolls, fares, and other expenses borne by the public generally"). In short, if this Court follows the Seventh Circuit in subjecting local governments to False Claims Act liability, all across the country the public will pay – and pay dearly – for alleged misconduct in which it played no part.

Similarly, the goal of deterring future misconduct would not be served by subjecting these local governmental entities to suit under § 3729(a). Travelers, taxpayers and other beneficiaries of public airport services and facilities – the individuals who would pay the lion's share of treble damages in the *Nguyen* case – do not have the capacity to make or deter the allegedly false grant assurances that have given rise to that lawsuit. At the same time, the agents

of local government who are in fact responsible for submitting the allegedly false claims for airport improvement grants, and who have the capacity to submit such claims in the future, will *not* bear the burden of a treble damages judgment, and thus will not be deterred from submitting such claims again. *See Newport*, 453 U.S. at 268 ("[I]t is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality"). A construction of the False Claims Act that yields such dubious results is "supported by neither reason nor justice." *Id.*

CONCLUSION

For all of these reasons, the Court should reverse the decision of the Court of Appeals for the Seventh Circuit, and affirm that local governmental entities are not "persons" within the meaning of § 3729(a) of the False Claims Act.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES ex rel. JANET CHANDLER, Ph.D.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF K & R LIMITED PARTNERSHIP, ANTHONY J. DUNLEAVY, AND JOHN A. KING, D.O., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT JANET CHANDLER, Ph.D.

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INTERESTS OF THE *AMICI CURIAE*[1]

K & R Limited Partnership (K&R) is a Massachusetts limited partnership that is the relator in a *qui tam* action filed in the United States District Court for the District of Columbia against the Massachusetts Housing Finance Agency (MHFA), a non-State, quasi-governmental entity. This case is currently pending before the United States Court of Appeals for the District of Columbia Circuit on an interlocutory appeal by MHFA pursuant to 28 U.S.C. § 1292(b).[2]

The primary issue on MHFA's interlocutory appeal is whether a non-State governmental entity is subject to liability under the False Claims Act (FCA). Therefore, if the decision below is sustained, MHFA's interlocutory appeal will necessarily be denied.

K&R, along with all other relators, seeks to protect the public fisc by ensuring that, when non-State governmental entities misuse a portion of the billions of dollars they receive annually from the Federal Government in violation of the FCA, such entities are subject to the remedies imposed by the FCA. Accordingly, K&R has a vital interest in seeking affirmance of the decision below.

---

[1]The parties have consented to the filing of this brief and the consents were filed with the Clerk of the Court contemporaneously with the filing of this brief. In accordance with Rule 37.6 of this Court, *amici curiae* K&R, Dunleavy, and King state that their counsel as specified herein authored this brief in whole and no person or entity, other than K&R, Dunleavy, and King, made a monetary contribution to the preparation or submission of the brief.

[2] The district court decision is reported at 54 F. Supp. 2d 19 (D.D.C. 2001).

Anthony J. Dunleavy is an adult individual and resident of the Commonwealth of Pennsylvania. Mr. Dunleavy is a relator in a *qui tam* action captioned *United States ex rel. Anthony J. Dunleavy v. The County of Delaware, et al.*, currently before this Honorable Court on Petition for Writ of Certiorari from the United States Court of Appeals for the Third Circuit.[3] In Mr. Dunleavy's case, the Third Circuit improperly concluded that Delaware County, a local county of the Commonwealth of Pennsylvania and a municipal corporation, was not subject to liability under the False Claims Act, without ever conducting the requisite statutory inquiry into whom Congress intended to encompass within the statutory term "person" in the Act. This Court's affirmance of the decision below would remand Mr. Dunleavy's case against Delaware County to the Third Circuit. Mr. Dunleavy's interest lies in ensuring that those who defraud the Federal Government are subject to the remedies created by Congress; and that whistleblowers are protected in their efforts to defend the Federal Fisc.

John A. King, D.O., is an adult individual and a resident of the State of Texas. Dr. King is the relator in a *qui tam* case currently pending in the United States Court of Appeals for the Eleventh Circuit, styled *United States ex rel. John A. King, D.O. v. Jackson County Hospital Corporation*[4] The district court dismissed Dr. King's complaint against Jackson County Hospital Corporation, holding that local government entities, as well as state agencies, are not "persons" subject to FCA liability. The Eleventh Circuit has stayed the appeal

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[3] The Third Circuit's Opinion is found at 279 F.3d 219 (3dCir. 2002).

[4] The district court's decision is found at 2001 U.S. Dist. LEXIS 21706 (N.D. Fla., August 17, 2001).

pending this Court's ruling in this case. An affirmance in this case would require the Eleventh Circuit to consider the hospital's alternative argument – that it is actually a "state agency" rather than a local government entity – an issue that was not expressly decided by the district court. As with the other relators, Dr. King has a direct personal interest in the resolution of this case, as well as an interest in ensuring that local government entities are held accountable for defrauding Federal taxpayers.

SUMMARY OF ARGUMENT

In 1863, Congress created the False Claims Act, and made all "persons" subject to its provisions. In 1863, the term "person" included all local governmental entities, such as municipal corporations.[5]

The lack of published opinions with local governmental entities as defendants prior to the 1986 Amendments is inconsequential, as there were few published opinions of any sort before these Amendments were enacted. Congress amended the False Claims Act in 1986 to encourage those with knowledge of fraud upon the Federal government to come forward. "Persons" liable under the FCA has always included local governmental entities.

In 1986, Congress amended the False Claims Act. These amendments strengthened the *qui tam* provisions of the Act, and changed the remedy provisions from double to treble damages. No changes were made to the term "person" in 1986. In adopting these amendments,

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[5] The terms "municipal corporations" and "local governmental entities" are used interchangeably in this brief to include all units of local government.

Congress intended all "persons," including local governmental entities, to be subject to the Act and liable for its remedy of treble damages.

The False Claims Act is the only effective means of protecting the Federal Treasury from fraud by local governmental entities. Congress determined that the False Claims Act was the preferred method for policing fraud upon the Federal Government. In 1986, Congress increased the protections offered to whistleblowers in order to encourage fraud reporting. Congress specifically created employment protections for relators, and made public sector employers liable for their actions against their employees. This action is further evidence that Congress intended local governments to be "persons" under the FCA.

Audits, Inspector General reports, and common law causes of action do not provide any incentives for whistleblowers to come forward, and provide no employment protections for relators. The only way to police fraud, and assure enforcement, is to enforce an effective False Claims Act against local governmental entities.

ARGUMENT

I. CONGRESS INTENDED THE FALSE CLAIMS ACT TO BE USED AGAINST LOCAL GOVERNMENTS, AS THE ACT IS THE ONLY EFFECTIVE MEANS AVAILABLE TO PURSUE FALSE CLAIMS AND FRAUD BY THESE ENTITIES.

A. CONGRESS INTENDED THE TERM 'PERSON' TO INCLUDE MUNICIPAL CORPORATIONS.

When Congress created the False Claims Act in 1863, it made all "persons" subject to the Act's liability provisions. In 1863, as is discussed more fully in Respondent Janet Chandler's brief, and in the brief of *amici* Taxpayers Against Fraud, Congress clearly understood municipal corporations to be "persons" subject to liability under the Act. Although the primary reason for adopting the FCA was a desire to stop massive frauds against the Union Army, the Act was broadly drafted so as to apply to all frauds against the Federal Government. *See* John T. Boese: *Civil False Claims and Qui Tam Actions*, 1-4, 1-11 (2d ed. 2002).

The argument that municipal corporations and local governmental entities must not have been persons under the FCA because there were no published opinions before the 1960s is without support. Although there were some cases under the FCA involving municipal corporations as defendants before 1986, there were no published opinions in these cases. In fact, there were few published opinions at all before 1986, because the FCA was not widely utilized before the 1986 Amendments. *See* Boese, *supra*, at 1-3; *United States ex rel. Springfield Terminal Rwy. v. Quinn*, 14 F.3d 645, 649-51 (D.C.Cir. 1994), *U.S. ex rel. LaValley v. First Nat.*

Bank of Boston, 707 F. Supp. 1351, 1354 (D. Mass. 1988).

Moreover, the 1943 amendments to the FCA led to decreased use of the FCA by providing that prior knowledge by the Government of the allegations in a complaint was an absolute bar to jurisdiction over *qui tam* suits. This Government knowledge bar made it extremely difficult to successfully prosecute an FCA action, and consequently led to decreased use of the *qui tam* provisions of the FCA. Boese, *supra*, at 1-14. Indeed, it was primarily to counter the effects of the 1943 Amendments that Congress overhauled the FCA in 1986, in an attempt to encourage the filing of *qui tam* suits. Thus, it is unsurprising that there are few reported FCA cases prior to 1986. The argument that municipal corporations are not persons under the FCA because there are no published opinions before the 1960s is misplaced.

The 1960s saw increased Federal spending on a variety of programs, much of it going to State and local governments. This spending has continued to increase in subsequent decades. *See Dixson v. United States*, 465 U.S. 482, 507 (1984) (O'Connor, J., dissenting) (noting that grants to State and local governments were $7 billion, or 7% of the budget, in 1962, and that this figure increased to $90 billion, or 10% of the budget, by 1984); *See also* Office of Management and Budget, Budget for Fiscal Year 2002, Historical Tables, Table 12.1 (projecting that grants to state and local governments will exceed 18% of total federal outlays by 2003). This increased spending expanded the pool of potential defendants under the FCA, as the Government spent its funds on a varied array of goods, services, and assistance. The expanded role of Federal funding in local governmental functions has produced an increased need for the False Claims Act. The FCA is the only

effective tool for stopping fraud upon the Federal Government by municipal corporations.

B. IN 1986, CONGRESS ALTERED THE REMEDY OF THE FALSE CLAIMS ACT WITHOUT EXCLUDING ANY CLASS OF LIABLE "PERSONS."

Both the House and Senate Reports on the bills that became the 1986 Amendments note that the purpose of the Amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S.Rep. No. 99-345, at 1 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266 (hereinafter "S. Rep."); *See also* H.Rep. No. 99-660 at 16 (1986). Congress noted that, "in the face of sophisticated and widespread fraud, the (Senate) Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." S.Rep. at 2, *reprinted in* 1986 U.S.C.C.A.N. 5267.

The FCA is intended to reach "all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." S.Rep. at 9, *reprinted in* 1986 U.S.C.C.A.N. 5274; *See also United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) ("the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government"). However, the drafters of the 1986 Amendments were aware that the Act's remedy, double damages plus a $2,000 penalty, had not been altered in 123 years. Therefore, in keeping with the need to recover the Government's losses, and to account for the effects of inflation, the House and Senate adopted treble damages plus a $5,000 to $10,000 penalty per false claim. S.Rep. at 17, *reprinted in* 1986 U.S.C.C.A.N. 5282.

In enacting the 1986 Amendments, which were designed to increase the effectiveness of the FCA, Congress manifestly did not intend to remove any class of potential defendants from the scope of the Act. Indeed, this Court acknowledged in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 783 n. 12 (2000), that the term "person" "remained in the statute unchanged since 1863." All "persons" – including municipal corporations – are, therefore, now subject to the Act's treble damages remedy, including non-State governmental entities. This is consistent with this Court's finding in *Stevens* that , "the presumption with regard to corporations is just the opposite of the one governing here: they are presumptively covered by the term 'person,' see 1 U.S.C. § 1." *Stevens*, 529 U.S. at 782.

With the 1986 Amendments to the FCA, and the expanded protections for *qui tam* whistleblowers, the Government has seen an increase in the number of filed cases, and increased recoveries for the Federal Treasury. This is precisely the result intended by Congress. S.Rep. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5288-89 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."). Clearly, Congress intended all "persons" subject to the FCA, including local governmental entities, to be liable for its remedy of treble damages.

C. THE FALSE CLAIMS ACT IS THE ONLY EFFECTIVE MEANS FOR DEALING WITH FRAUDS BY MUNICIPAL CORPORATIONS UPON THE FEDERAL GOVERNMENT.

Congress and courts have long acknowledged that the False Claims Act is the Federal Government's most effective means of policing fraud, since it provides unique incentives for enlisting the aid of whistleblowers who have knowledge of the fraud. As Congress recognized in 1986, "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S.Rep. at 4, *reprinted in* 1986 U.S.C.C.A.N. 5269.

Non-State governmental entities receive billions of dollars each year from the Federal Government. For example, in its amicus brief in this case, the City of New York acknowledged that it "annually receives billions of dollars in federal funds either directly from the United States or through the State for numerous essential municipal services and programs." Brief *Amici Curiae*, City of New York, *et al.*, filed September 9, 2002, 2. In addition, the City of Milwaukee, Wisconsin, acknowledged that it received "approximately $50.6 million in federal dollars to either spend or administer primarily for Community Development Block Grants and for public health and law enforcement purposes." *Id.* at 3.

The main argument cited by these non-State governmental entities for not subjecting them to liability under the FCA is that an award of treble damages will "harm local taxpayers," "harm the beneficiaries of essential local services," and subject them to "massive punitive remedies of treble damages plus penalties." *Id.*

at 2-3. [6] However, this argument ignores the adverse effects that false claims by local governmental entities have on Federal taxpayers. In addition, adopting this argument essentially grants a license to non-State governmental entities to commit fraud against the Federal Government with impunity.

As Benjamin Franklin once stated, "[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the Government." James B. Helmer, Jr., False Claims Act: Whistleblower Litigation (3rd ed. 2002), p. xxi. As local governments and government-owned corporations increasingly seek to participate in the growing market for federal funds, it is to be expected that such entities will succumb to the same temptations afflicting their private counterparts. Although local government entities might be subsidized by local taxes, a dollar received from the Federal Government (and paid by taxpayers throughout the country) is a dollar that does not have to be raised through local taxation. In that the FCA is a federal statute, seeking to protect federal taxpayers, it is extremely unlikely that Congress, whether in 1863 or in 1986, would have intended to give local governments any more leeway than private corporations to defraud federal taxpayers.

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[6] Delaware County also argues in its *amicus* brief that the False Claims Act is punitive as applied to them because the Third Circuit allowed Mr. Dunleavy to proceed with his cause of action regardless of any audit resolutions with HUD. *See* Brief, at page 5. However, the language cited by Delaware County from *United States ex rel. Dunleavy v. The County of Delaware, et al.*, 123 F.3d 734 (3dCir. 1997) ("Dunleavy I"), has been essentially overruled in *Stevens*, where this Court ruled that a relator only has rights as a partial assignee of the Government, and has no standing to assert the injury in fact separate from the Government. *Stevens*, 529 U.S. at 773.

As is demonstrated by the increasing number of *qui tam* cases being filed against local governmental entities, fraud by these entities against the Federal Government is on the rise, and becoming more sophisticated. This is understandable, since local governmental entities are increasingly providing the types of services that might otherwise be provided by traditional private corporations, and are competing with such private corporations for federal tax dollars. For instance, in Dr. King's case, the defendant is a county hospital corporation authorized by state statute to provide hospital services to residents of the county. As with private hospitals, the county hospital charges for its services, and seeks reimbursement from Medicare and Medicaid for eligible patients. Except for the fact that it is created by legislative act, and is partially subsidized by local public funds, the hospital differs little from a private, non-profit corporation.

It should be noted that total federal spending on health care alone, primarily consisting of Medicare and Medicaid, amounted to $389 billion in 2000, or 21.7% of total federal outlays, and that this amount is projected to increase substantially. Office of Management and Budget, Budget for Fiscal Year 2002, Historical Tables, Table 16.1. Given that public hospitals like Jackson County Hospital Corporation compete on an even basis with private hospitals for this enormous amount of federal funds, it defies imagination to suspect that Congress intended to immunize such entities from FCA liability.

Although it is difficult to quantify the exact amount of fraud committed by local governmental entities, a brief look at many of the cases involving such entities is illustrative of the nature of the problem. In its case, K& R Limited Partnership has alleged that when MHFA, the non-State, quasi-governmental defendant entity therein, refunded older, higher-interest-rate bonds

with new, lower-interest-rate bonds in 1993, the assistance provided by HUD to MHFA pursuant to HUD's Section 236 Program should have been reduced. However, MHFA has, in violation of the FCA, continued to this day to request and receive the same amount of assistance that MHFA was receiving prior to the refunding of the aforementioned bonds at a lower interest rate. The amount of the alleged false claims in this case exceeds $20 million.

In Mr. Dunleavy's case he alleges that Delaware County failed to report to the Department of Housing and Urban Development ("HUD") its retention of HUD Community Development Block Grant funds in the amount of almost $6 million in principal and interest.[7] Instead, Delaware County routinely used this account as a slush fund, to cover general budgetary shortfalls, depleting principal and interest funds that belonged to the Federal Government. Instead of HUD funds going to assist low- and moderate-income persons with jobs or housing, they went to pay for Delaware County's salary overruns and miscellaneous overhead, an illegal use of Federal funds.

In Dr. King's case, he alleges that Jackson County Hospital Corporation wrongly billed the Government for medical costs in numerous ways. For instance, he alleges that the defendant improperly billed for items of durable medical equipment (DME) without a required

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[7]Delaware County alleges in its amicus brief that it is being unfairly punished, as it paid funds to the Federal Government in an audit, and now is still liable under the FCA. *See* Brief, at 4-6. As Delaware County is well aware, the audit resolution between the County and HUD was judicially determined by the district court not to be an "alternate remedy" under the FCA. Delaware County's argument that it will be liable for damages "calculated in the face of a credit" is illogical, as the audit resolution was judicially determined to be unrelated to the FCA action. Therefore, Delaware County's arguments are misleading and deceptive.

DME provider number; falsified time records in connection with billing for operating nurse services; submitted false billings in connection with anesthesia services; and improperly provided discounts to Medicare and Medicaid patients.

In *United States ex rel. Thomas E. Kalkhof v. County Commissioners Association of Pennsylvania, et al.*, U.S. District Court for the W.D. of PA., No. 01-93E, it is alleged that each of twenty (20) Defendant counties in Pennsylvania defrauded the Federal Government by misappropriating federal Medicaid funds intended for low-income nursing home patients. This fraud occurred when the counties claimed, through deceptive and fraudulent documentation they knew or should have know would be utilized by the State for federal submission, that they were receiving State and federal Medicaid money to be used for enhancing covered medical services for low-income persons in order to qualify for federal matching funds. In fact, these counties were not enhancing covered medical services for low-income persons with the money, and any such certifications were false. In all cases, the lion's share of the federal Medicaid funds were actually wire transferred back to the State and used for non-Medicaid allowable expenses, or uses entirely unrelated to the enhancement of Medicaid health care for which they were to be limited. Mr. Kalkhof's efforts brought about an audit by both the Office of the Inspector General and the General Accounting Office, which concluded that similar fraud schemes were occurring in fourteen other states . Congress has subsequently mandated regulatory changes through the Department of Health and Human Services' Centers for Medicare and Medicaid Services. The total amount of Medicaid money obtained by Pennsylvania and its counties alone for just the past 3 years through use of the fraudulent and deceptive claims is in excess of $ 968.6 million. This federal money was

either used for non-Medicaid health and welfare programs or remains unbudgeted for other uses.

In *United States ex rel. Hickman County, Tennessee*, currently on appeal in the Sixth Circuit (No. 01-5680), Hickman County was declared eligible for Federal Emergency Management Agency (FEMA) funds after severe flooding in 1991. In order to qualify for sufficient funds to rebuild every bridge in its county, Hickman County intentionally destroyed at least six bridges which were less than 50% damaged by flood in order to qualify to rebuild, instead of repair, all bridges in the county.

In *United States ex rel. Giles v. Sardie*, 2000 U.S. Dist. LEXIS 21068 (C.D.Cal. July 27, 2000), the relator has alleged that the City of Los Angeles misstated and overinflated costs related to highway repairs to FEMA after the Northridge earthquake. In *United States ex rel. Honeywell v. San Francisco Housing Auth, et al.*, 2001 U.S. Dist. LEXIS 9743 (N.D. Cal. July 12, 2001), Honeywell Corporation has alleged that the San Francisco Housing Authority retained savings in energy consumption from HUD, and failed to pass some of these savings through to Honeywell, as Federal regulations required.

There are more cases reported, unreported, or still under seal. But whether there are ten, or one hundred, the reality is the same: non-State governmental entities are capable of, and are in fact, perpetrating fraud upon Federal programs in increasing numbers. When Congress provides funds to local governmental entities (e.g., through block grants), or allows such entities to compete on an equal basis with private corporations for such funds (e.g., through Medicare reimbursement), it does so with the expectation that the funds provided will be used for proper purposes. The Federal funds received by such entities are not raised from the local taxpayers,

but are instead raised from taxpayers throughout the nation.

Without the FCA, there is no mechanism in place to stop this sophisticated fraud, and return stolen Federal funds to the Federal Government. Without the FCA, these non-State governmental entities are given free license to steal from the Federal Treasury.

a. No Effective Alternate Means Exist To Recoup Funds Fraudulently Obtained By Local Governments.

Nothing in the FCA suggests that Congress intended its provisions to apply only when the Government lacks alternate means to combat fraud. To the contrary, the FCA explicitly provides that "the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty," and provides that a relator retains his rights in any such proceeding. 31 U.S.C. § 3730(b)(5). Thus, it is plain that Congress intended for the FCA to be a remedy available to the Government, regardless of the availability of any other remedies. The assertions by amici that alternate remedies are available to deal with fraud by local governments is completely irrelevant to a determination of whether such entities are persons subject to FCA liability.

Moreover, alternate means for dealing with frauds against the Federal Government lack the effectiveness and protections of the FCA. For those reasons, Congress, in its wisdom, chose the FCA as its primary means of fighting fraud against the Federal Government. While Delaware County, the Petitioner, and its amici, are entitled to their opinion that alternate means exist to police fraud by local governments, that opinion is

entitled to no weight. Congress itself has declared the FCA as the preferred, and most effective, means of policing fraud by local governmental entities.

The Single Audit Act audit, mentioned by Delaware County in its brief, is an audit performed by the grantee of its use of Federal funds. *See* Brief of Delaware County, 9. As the Third Circuit noted in *Dunleavy I*, such reports or audits lack trustworthiness when

> the party accused of defrauding the federal government is in control of most of the sources of information that would effectively reveal the wrongdoing. This information dynamic was, in large part, a motivating factor behind the 1986 Amendments. Congress emphasized its belief that 'detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.' S.Rep. 99-345, 99th Cong. 2d Sess. 4, *reprinted in* 1986 U.S.C.C.A.N. 5269. Additionally, the Reporting Committee perceived the existence of 'a conspiracy of silence' to defraud the federal government. *Id.* At 6, *reprinted in* 1986 U.S.C.C.A.N. at 5271.

Id. at 745. Accordingly, audits or other reports prepared solely by the local governmental entity accused of fraud have no guarantee of accuracy or trustworthiness, and therefore cannot replace an effective False Claims Act.

Common law causes of action, such as fraud, are no substitute for an FCA claim. Among other things, the elements of the claims are different, since fraud requires a showing of intent, and an FCA claim only requires a showing of a reckless indifference. *See United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997) (noting that "reckless disregard in [the FCA] context is not a 'lesser

form of intent,' but an extreme version of ordinary negligence"). Moreover, relators have no standing to bring common law claims for fraud on behalf of the Federal Government, or against the local government, although they do have Article III standing under the FCA. The *qui tam* section of the FCA allows private attorneys general to pursue false claims even if the Government cannot adequately investigate them due to its limited resources. No common law cause of action provides this benefit.

While each Federal agency has its own Office of Inspector General, the IG alone cannot discover fraud when it is hidden by sophisticated means. None of the cases cited above was found first by an IG, although the IG may have subsequently been involved. The IG cannot detect frauds that are known to whistleblowers, without the relator's assistance and support. While IG offices play an important role in monitoring federal agencies to ensure that federal funds are spent properly, they do not have the resources needed to detect the ever increasing fraud perpetrated on the Federal Government by local governments. Without whistleblowers, as contemplated by the FCA, IG offices cannot hope to detect all the fraud committed by local governments. *See* S.Rep. at 4, *reprinted in* 1986 U.S.C.C.A.N. 5269 ("With the inception of Inspectors General, an increased number of fraud allegations are being addressed. However, available Department of Justice records show most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected.")

The Senate Report on the 1986 Amendments noted that audits alone are insufficient to weed out fraud. One relator told the Committee that "notice of an impending audit normally travels through the contractor plant 'like wildfire' and 'everyone straightens up their act'.... all departments were put on 'red alert' when auditors came through." S.Rep. at 6, *reprinted in* 1986

U.S.C.C.A.N. 5271. Without whistleblowers, IG offices cannot alone find all the fraud hidden by local governments. While IG offices play an important role in monitoring federal agencies, they cannot replace an effective False Claims Act.

b. Alternative Remedies Do Not Provide Protections to Whistleblowers

The beauty of the FCA is its ability to protect whistleblowers while encouraging them to come forward with their knowledge of frauds. Common law claims, audits, IG investigations, or other alternatives provide no protections to a whistleblower, and offer no incentives for potential whistleblowers to reveal their knowledge of fraud, which was the single most important goal of Congress in enacting the 1986 Amendments. *See* S. Rep. at 2, *reprinted in* 1986 U.S.C.C.A.N. 5267. ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."); *id.* at 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5288-89 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."). As this Court noted, "one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting...under the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n. 5 (1943).

The FCA also provides employment protection to relators:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. §3730(h). No audit, common law cause of action, or IG review provides the protections afforded a whistleblower by the FCA. These protections were enacted by Congress to encourage those with knowledge of fraud to come forward.

To receive protection under §3730(h), a plaintiff must show that there is a distinct possibility that a viable False Claims Act cause of action would be filed. *See Dookeran v. Mercy Hospital of Pittsburgh, et al.*, 281 F.3d 105, 108 (3d Cir. 2002); *accord McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 516 (6th Cir. 2000); *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 867 (4th Cir. 1999); *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 741 (D.C. Cir. 1998); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir.1996); *Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996). Without a viable FCA cause of action, potential whistleblowers would receive no employment protections. Without employment protections, local government employee whistleblowers will not come forward to reveal fraud. Congress created these protections to encourage fraud reporting. These protections are necessary to reveal fraud by local governmental entities.

As the Seventh Circuit noted in *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969, 975

(7thCir. 2002, the § 3730(h) protections extend to public sector employees, indicating that Congress intended public sector employers to be potential defendants under the Act:

> Unless municipalities are subject to suit under the FCA, Congress would have no reason to be concerned that municipalities might retaliate against their employees for bringing FCA claims. Given that states are excluded from the definition of 'person' within the FCA, the only public entities remaining are municipal corporations and other political subdivisions of states which are not arms or agencies of state government.

Section 3730(h) even protects employees who are investigating a potential fraud, indicating "Congress' intent to protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together." *Yesudian, supra*, at 740. The combined safeguards afforded whistleblowers under §3730(h) offer protections to local governmental employees that audits, IG reports, or common law remedies cannot provide.

Congress created the False Claims Act with a purpose "to encourage any individuals knowing of Government fraud to bring that information forward." S. Rep. at 4, *reprinted in* 1986 U.S.C.C.A.N. 5266-67. "Few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation." *Hutchins v. Wilentz*, 253 F.3d 176, 186 (3dCir. 2001), citing S.Rep. No. 99-345. No alternate means exists to protect whistleblowers while pursuing fraud. Accordingly, the whistleblower protections accorded to employees of local governments by the FCA is a further indication that Congress intended that local governmental entities be subject to liability under the FCA.

CONCLUSION

Local governmental entities are increasingly perpetrating sophisticated frauds upon the Federal Government. The False Claims Act was created by Congress, and amended in 1986, to encourage those with knowledge of fraud upon the Government to come forward. Congress intended municipal corporations to be "persons" subject to the FCA and to be liable for its remedy of treble damages.

No other remedy exists to discover and prosecute fraud and false claims by local governmental entities. No other remedy offers the protections to whistleblowers contained in the False Claims Act. The False Claims Act is the only effective means of recouping funds wrongfully obtained by local governmental entities from the Federal Government.

Relators K&R Limited Partnership, Anthony J. Dunleavy, and John King, D.O., respectfully request that this Honorable Court uphold the decision of the Seventh Circuit in *Chandler*.

Respectfully submitted,

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